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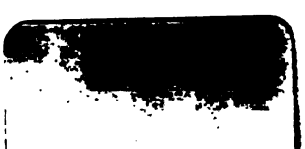

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Wills, Estates, and Trusts

A Manual of Law, Accounting, and Procedure, for Executors, Administrators, and Trustees

By

THOMAS CONYNGTON
Of the New York Bar.

HAROLD C. KNAPP, B.S., LL.B.
Of the New York Bar; Lecturer on "Trust Work of a Bank," New York University; Vice-President and Trust Officer, Fidelity Trust Company, New York City.

PAUL W. PINKERTON, C.P.A.
Associate of the American Institute of Accountants; member of Ellis, Pinkerton and Company, Certified Public Accountants.

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PREFACE

The purpose of this book is to provide a working manual for executors, administrators, and trustees, and for all others who hold property in trust. It is estimated that everything held in private possession changes ownership by reason of death, approximately three times each century. On its way, the greater part of this property passes through the hands of some executor, administrator, or personal representative of the former owner, and a very large proportion is held for a time in trust for the benefit of dependents or of those to whom it is later to go.

These trusts are created most frequently perhaps when property intended to furnish support for widows and minor children is left for long terms to trustees, to hold, manage, and pay over the income. There are excellent reasons, as set forth in the present work, why such trust estates are surer and safer than any other arrangement that can be made to provide for the welfare of a man's family.

As it becomes more widely known how readily property may be placed in trust and its income devoted to particular ends, without fear of loss or diversion to other purposes, this method of providing for one's family or for other dependents will increase in favor. The law relating to trusts will then take a proportionately more important place, and a knowledge of the rules which govern will become more essential. The present volume is intended to supply this in non-technical form.

Trust companies have for many years handled trust estates of this kind. National banks also may now hold and ad-

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minister them. As the advantages of appointing corporate trustees become better known many more men will make banks and trust companies their executors and will leave funds and other property with them in trust for their families. Personal executorship may then become entirely a thing of the past.

Some subjects are necessarily treated in more than one part of the present volume, and this has made a certain amount of duplication unavoidable. The subject of inventories, for example, is treated in several places and from different points of view. It is easy to pass from one to another if it is desired to get a comprehensive view of the whole, and references are freely given, so that the whole of any subject is readily accessible.

It is hoped that a clear exposition of the whole process of settling estates will help those having property to leave to put it in better shape for their executors to handle, and generally enable them to make wills with more intelligent care and forethought for those who come after them.

The authors wish to express their gratitude to the many friends who have assisted them, especially to George P. Ellis, C.P.A., of Chicago, for many valuable suggestions in regard to probate accountancy and to Florence Sullivan, of the Northern Trust Company of Chicago, for general assistance in preparing the accounting portion of the volume.

Any suggestions from readers looking towards the betterment of the present volume will be gratefully received.

THE AUTHORS

New York City,
November 21, 1921

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INTRODUCTION

To Readers in General

All the existing wealth of the country that is privately owned changes hands with the passing of each generation. In this transfer many are interested. Those who have property that they must leave and those who will receive it are alike concerned in the matter. The rights involved are at times complex and often are not well understood even by the more intelligent. All in all, many are concerned and should be interested in what is set forth in this book.

Executors, Administrators, Guardians, and Trustees

Executors, administrators, trustees, and guardians of property, all have the legal possession of property that belongs to others. They hold such property in trust and those who hold property in this way are termed "trustees." It is the purpose of this book to treat broadly of the duties and liabilities of trustees. Other matters, such as the execution and interpretation of wills, which they should know in order to act intelligently, are treated briefly.

Any man of character and repute is likely to be chosen, alone or with others, to act in some form of trusteeship. In such case certain new duties and responsibilities will suddenly be thrust upon him. Unless some similar experience has been his, he will wish to inform himself as to his duties, his authority, and his possible liabilities.

Trust Officers of Financial Institutions

Trust companies have for many years qualified as executors, as administrators, as trustees, and as guardians of prop-

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erty for minors. Now, national banks are assuming these same duties. It follows that part of the business training of a competent bank official will be in the law of trusts and the settlement of estates. It is intended that this book shall contain all the general law relating to trusts and trustees that such officials should know.

Public Accountants

The professional accountant may at any time be called on to prepare a system of accounting for the settlement of a large estate, or to prepare the formal accounting that is required of those administering a trust. To do this he must know well the requirements of the law relating to the settlement of estates, and the duties of executors, administrators, and trustees. The legal information in this work contains the general principles the accountant should know, and approved forms of accounting adapted to the requirements of the statutes and courts of probate.

A Work for General Use

There are a few brief and too elementary works on this subject and there are excellent professional works, too comprehensive and too technical for any but a lawyer's use. This work is intended specifically to meet the needs of the classes that have been mentioned—executors, administrators, trustees, bank officials interested in trust business, accountants, and generally those concerned with the settlement of estates and the handling of trusts.

The questions after each chapter are designed: (1) to review the subject matter, (2) to suggest other aspects, and (3) to test the mastery of principles. Not all of the questions are to be answered. Some of them are intended to show how often problems come up that cannot be easily solved and over which even courts will differ.

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Case Law

In the Appendix are given leading cases supporting the legal principles that have been set forth. These cases are taken from the better known and more accessible reports. Many good cases are obscured by subordinate questions of evidence, by faulty or deficient pleading, or by technical errors of procedure, which make it difficult for any but a trained lawyer to recognize the essential principle decided or affirmed. Such cases have been avoided, so far as possible, in these lists.

A Guide to Those Having Property to Leave

What is said in this work of wills and the principles that guide courts in construing them is only incidental to the main purpose of the book, which is the management and settlement of estates by executors, administrators, and trustees. This knowledge as to the effect of provisions in a will and of the way in which estates are settled will be found helpful to the man who is giving thought to the making of his own will, and the settlement of his own estate. Most of the mistakes made by testators are due to their lack of information as to how courts will construe wills, and how executors and administrators deal with estates and property after the former owner has gone.

Everyone having property to leave should want to leave it so as to do the most good and cause the least expense and trouble to those whose welfare he has in view. This should lead a man to inform himself as to the law and practice relating to the settlement of estates. With this knowledge he can, as is advised herein, roughly draft his will, and after consideration and careful thought consult a lawyer.

Variations in State Law

In all matters that relate to law it must be remembered that owing to our system of federated states, the legislature of each

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separate jurisdiction has power to vary not only the methods of procedure but the general principles of law as well. The inconvenience of this is so great that in the rules relating to negotiable instruments, a uniform law has been agreed to in practically every state of the Union. In several other matters of business law the same uniformity is gradually being attained, but in other branches of the law there is no prospect of general uniformity.

The leading text on the subject of trusts says:

> It is not possible to know or state the legislation of so many states upon the various matters connected with the administration of trusts. The intelligent lawyer must do this for himself, when the questions before him depend upon the statutes of his State rather than upon the general principles common to all of the States.[1]

Under these circumstances anyone who has to administer an estate or a trust, or who is studying the general subject, should have access to the statutes of the state in which he lives, relating to wills, descent, distribution, trusts and allied topics, and to the rules of procedure of the court having probate jurisdiction in his locality. These should be studied in connection with this work and any peculiar features should be noted on the margin of the text, with a reference to where it can be found again in the statutes or rules of probate procedure.

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1 Perry on Trusts, Vol. I, § 12.

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Wills, Estates, and Trusts

PART I

TRANSFER OF PROPERTY BY DEATH

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CHAPTER I

PROPERTY

§ 1. Meaning of the Word "Property" [1]

"Property," broadly defined, is any thing or things that can be owned. The term includes land, goods, chattels, moneys, and rights.

The essential element of property is the right of exclusive ownership. A man's home, his dog, his clothes, his books, his desk, are all property; that is, he has the exclusive right to these things. It would seem that originally such rights to exclusive ownership could be justly acquired only by labor or by occupancy. The man who laboriously made a stone hammer certainly had a right to its exclusive use. If, before there was law or record of title anywhere, he built a shelter on unoccupied land, he was justly entitled to its occupancy as against every other man. Our system of civilization is built up very largely on this institution of private property or exclusive ownership.

Blackstone in stately phrase defines the rights of property as:

> That sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of every other individual.[2]

In a late Illinois case, the court held that:

> Property in its appropriate sense, means that dominion or indefinite right of user and disposition which one may law-

[1] Wherever possible, cases bearing on points brought out in the text have been selected and placed under the same section number as the subject matter to which they refer. These will be found in the back of the book under Appendix A.

[2] Blackstone Comm., Chapter I.

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> fully exercise over particular things or subjects and generally to the exclusion of all others; yet the term is often used to indicate the res or subject of the property, rather than the property itself.[3]

In the federal constitution and in the constitution of every state, the right to own property is guaranteed, the usual phraseology being: "No person shall be deprived of life, liberty, or property, without due process of law." The right, however, does not depend on constitutional provisions.

> The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions, and charters," but it was the old fundamental law, springing from the original form and constitution of the realm.[4]

§ 2. Ownership of Property

The natural ownership of property should justly arise originally from labor or occupancy. The rightful owner could then give, sell, or barter his right to another, who would have an equally good title. Such ownership is both just and natural. On the other hand, our present ownership as enforced by the courts, is not always natural and not always just, but it is always legal and depends primarily on the law of the land for its sanction.

No man can naturally or morally have property in another human being, but our laws for many years recognized slavery or rights of property in men and women whereby they could be bought and sold, and compelled to forego every right of a freeman. The constitution and our laws allowed this, and our courts enforced such alleged rights of property. At the present time, our laws define and enforce certain rights of property in land, animals, contracts, privileges, inventions, merchandise, and many other things. The extent of these rights, the rules

[3] Rigney v. Chicago, 102 Ill. 77.
[4] Cooley, Constitutional Limitations, p. 436.

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as to their transfer, and the disposition of property after death, all depend on what is prescribed by law. As the moral ideals of the community expand, some of these rights that are legal now will doubtless be limited and modified.

Much ownership of property originally came by force or fraud, but it would not be possible to correct these titles justly now. Most of those who now own property paid for it, exchanged other property for it, or inherited it, and it would be neither just nor equitable to try to correct old wrongs by dispossession of the present holders.[5] This is generally recognized, and possession is said to count for nine points of the law, and statutes of limitation cut off litigation on old claims.

Most disputes, wars, and contentions between nations and individuals have arisen from conflicting rights of property. Hence, to avoid or minimize disputes, as soon as any social organization or form of government was established, the ownership of property and the right to its possession and its transfer by death or otherwise were all carefully prescribed and regulated. So it has come about that we hold our property by the authority of the law, we enforce our property rights by the law, and after death the law prescribes where and how our property shall go.

The matter may be summed up as follows:

1. Some titles to property originally acquired by labor, occupancy, or perhaps discovery or finding, are natural and just.

2. There would seem to be many titles existent that at some time were based only on superior force, fraud, or cunning.

3. The time comes to every people when law is established, and by way of compromise and for expediency it recognizes all the existing titles and tries to regulate future transfers and takings of title on lines of comparative justice.

---

[5] "Perhaps the best way of transferring private property to social ownership, would be by inheritance and transfer taxes of 100%. It would take only a single generation, thirty years or so, to transfer the bulk of all socially necessary property to the people by this method." Socialism, Berenberg. The inequity and inexpediency of any such summary annulment of property rights is obvious.

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Therefore, of necessity, we look to the law for practical and actual guidance in all that relates to the ownership and transfer of property.

§ 3. Real Property

Property is divided into real and personal. Real property consists of lands and the buildings and structures upon land. All other things that can be owned are classed as "personal property." Broadly, real property is immovable and personal property is movable.

For reasons based on the feudal system, the ownership of land came to be esteemed in law more highly, and as conferring more dignity upon the holder, than the same or greater value in goods, wares, or merchandise.

For reasons relating to the same feudal system, the laws relative to the transfer or inheritance of real estate are different from, and much more formal than, those governing the transfer of personal property.

Real property includes not only land but things personally attached to land, as ice, growing trees, buildings, and structures. When a piece of personal property, as a steam boiler, is permanently attached to real property, it becomes realty and thereafter goes with the land.

It is a principle firmly established that the law of the state wherein real estate is situated controls and governs its descent and transfer. No state can legislate as to how lands in other states shall be inherited or conveyed.[6]

§ 4. Personal Property

"Personal property" or "personalty" is a broad term and includes all property that is not realty. Goods, wares, and merchandise, money, notes, and corporate stock, are all personal property. Ice, coal, ore, sand, clay, gravel, and trees, all

[6] Clarke v. Clarke, 176 U. S. 186.

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become personal property when severed and separated from the soil. On the other hand, wood, glass, metal, brick, and other building materials, all become real property when permanently attached to the soil or to any structure attached to the soil.

The owner of personal property has the right to possess, to use, and to enjoy it (so long as he injures no one else), to sell it or to give it away at will, subject only to his debts, to taxation, and to the state's right of eminent domain and the exercise of the police power.[7]

§ 5. Moneys

Money on hand or in the bank, because of its portability, because it can be used to satisfy all debts and obligations, and because it can be exchanged for any other desired real or personal property, is the most esteemed form of personalty.

> Money is the medium of exchange. Whatever performs this function, does this work, is money, no matter what it is made of.[8]

In modern business the function of money is widely extended by the use of instruments of credit, notes, checks, and bills of exchange that largely take the place of cash in trade.

Notes:

1. Money should always be deposited in a bank.
2. A custodian should never mix with his own money other funds of which he has the keeping.
3. The funds of another should always be separately deposited in the name of the depositor as agent, executor, or trustee.

§ 6. Instruments of Credit

Checks, notes, bills of exchange, and acceptances are generally termed "negotiable instruments." Legally they are not

[7] 32 Cyc. 674.
[8] Walker, Political Economy, Vol. III, pp. 144, 622.

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money but are classed as "choses in action." (See § 9.) They are also termed "instruments of credit." Their use in business is extensive, and every business man should be well posted on the laws relating to their use. The statutory law relating to negotiable instruments has been made uniform throughout the United States.[9]

§ 7. Stocks and Bonds

Most estates of any size consist largely of stocks in corporations and bonds issued by corporations. These are collectively termed "securities." Men who are engaged in business generally use the corporate form of organization, and their interests in the enterprise are shown by certificates evidencing how much their investments total. Others not actively engaged in business invest their surplus wealth in stocks or bonds of corporations that declare dividends on their stock and pay interest on their bonds. Technically, certificates of stock represent an investment, while bonds represent money loaned. Stocks are personal property even though the entire capital of the corporation issuing the certificates is invested in land.

Today a vast proportion of the existing wealth of the country is represented by stocks and bonds. The law on this subject is part of every banker's and broker's business equipment. It is necessary also for all who are custodians of the estates of others.[10]

§ 8. Goods and Chattels

These are the tangible things which men buy and which must be inventoried and sold when the owner dies, unless specifically disposed of by will. Raw material bought to be

[9] For a condensed work on the subject, based on the Uniform Negotiable Instruments Law, see Tompkins, The Law of Commercial Paper, 1912.
For a lawyer's standard text, see Daniels, Negotiable Instruments (6th ed.), in 2 volumes.

[10] Conyngton, Corporate Organization and Management, treats the subject from a business man's point of view. Cook on Corporations (7th ed.), in 5 volumes, is a lawyer's standard text. From the investment point of view, the following are desirable: Lough, Business Finance; Dewing, The Financial Policy of Corporations.

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manufactured, and wares and merchandise bought to sell again, are generally assets that can be sold with some moderate deduction from their cost.

Household goods, automobiles, live stock, and the like, in ordinary times are always sold for less than they cost. All machines depreciate rapidly and hence sell second-hand at low prices. Some men of special tastes are able to buy books, coins, stamps, pictures, and other works of art, and sometimes live stock of fine breeds, so that on sale they show handsome gains. When Robert Hoe, the famous maker of printing presses, died, his collection of rare books sold for $1,932,056.60 and gave his heirs a considerable profit over their cost.

When rare and beautiful things have been gathered together, the best disposition of them, if the owner can avail himself of it, is to leave them to those who will care for them and to whom he is bound by ties of blood or of friendship. In many cases, however, no specific disposition is made and they must then be sold and the money apportioned. A sale of personal treasures to strangers is always distressing.

§ 9. Choses in Action

This is a legal phrase meaning claims that can be made the basis of an action at law. They are rights and are intangible property. A bond calling for the payment to the registered owner or to bearer of $1,000 is a chose in action. Any contract right of this nature survives, and a man's executor or administrator can sue upon it. An injury to the person, a libel, or a personal wrong, on the other hand, might give the immediate party injured a right to sue, but it would not be a chose in action and would die with him and his executor could not sue upon it.

"Choses in action" is a broad term and includes all instruments of credit, stocks, bonds, contracts, accounts, claims, and every right of action that can be assigned or inherited.

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§ 10. Effect of Death on Property

It is not easy to conceive of a society without law. If such existed, when a man died those immediately about him would take possession of whatever things he owned. There would likely be contention and disorder. Soon some customs of inheritance would become necessary to preserve the peace and avoid strife. It is probable that our laws of descent and distribution of today had their origin in time so remote that we have no records concerning it. The general theory of all these customs that grew into laws was that a man's immediate family, his wife and children, have the best claim. The laws of all our states are to this effect.

Later, the feudal law introduced its own rules as to the inheritance of lands and real property. The law of primogeniture as it exists in England, by which the eldest son inherits the landed estates to the exclusion of younger sons and all daughters, is glaringly unjust, but it exists today although the reason for the rule has ceased for centuries.

The rules of descent and distribution vary in different parts of the world, and there is some variance in the different states of the Union. (See § 12.) Most of them distinguish between the descent of realty and the distribution of personalty, but it should be noted that this distinction is arbitrarily made by statute. There would seem to be no valid reason why a man's heirs and the proportions allotted to a man's heirs should not be the same whether he owned exclusively either real estate or personalty.

The custom of making wills grew up gradually and became law. Now it has become statute or written law instead of custom crystallized into law. In every state the right to make wills is given by laws enacted by the legislature. These laws prescribe how long a man may control his estate after he dies, how much he may leave to charity, how far he may disinherit his children, and what rights of husband or of wife may not

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be infringed by will, and of late years what percentage the state itself will arbitrarily take as inheritance taxes.

Notes:

1. The disposition of the property of a man who leaves no will is prescribed by statute.
2. The right to leave property by will extends only to such disposition as the statutes permit.

Review Questions

1. What is property? How does a man get property? What does socialism teach as to property? What is communism? What are the advantages of private ownership?
2. How may a man secure a just title to property? How may a legal title to property be secured? Why is the law so much concerned about property rights? If we had no law regulating the rights of property, what would be the effect? If you had bought an automobile from a stranger and later another stranger appeared and showed that the car had been stolen from him, to whom would the car belong? Why? What are statutes of limitation? Why are they necessary?
3. Why is property classified as real and personal? Is there any present reason why the inheritance of real property and personal property should be distinguished? What things may be included with realty?
4. What is personal property? When do materials originally part of the realty become personalty? When does personal property become realty?
5. Why is money the most desired form of property? How is the function of money extended? What are instruments of credit?
6. What are negotiable instruments? Why are they so called? Why has the Uniform Negotiable Instruments Law been adopted in all the states?
7. Distinguish between corporate stocks and bonds. What is the difference between interest and dividends? Which yield the greater income, stocks or bonds? Which are usually the safer investment? Why?

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8. Why are household goods usually sold at a loss?
9. What are choses in action?
10. What are the laws called that prescribe what is to be done with a man's property when he dies? What simple rule as to descent of property prevails in England?
11. How long should a man be allowed to control his estate after death? Should the right to leave property to charity be restricted? Why? Should a man be allowed to disinherit his children? Should a man be allowed to will all his property away from his wife? How much should the state take as inheritance taxes?
12. What does the law in your state prescribe as to all the points in the foregoing paragraphs?

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CHAPTER II

DESCENT AND DISTRIBUTION

§ 11. Intestacy

When a person draws up, in accordance with the formalities prescribed by law, a document in which he states to whom his property is to go after his death, he is said to have made his last will and testament, the word "testament" being only a legal synonym for "will." The person who makes a will is called the "testator" or, if a woman, the "testatrix."

A person: (1) who dies without having made a will, or (2) who has made only one will, which has been adjudged to be invalid, or (3) who has made a will but has revoked or destroyed it and died before a new one could be made, or (4) who has left a will, but no one to take under its provisions, is said to die intestate and is referred to as an "intestate." If a person made a will that disposed of only part of his property, he would die intestate as to the part not mentioned in the will.

In all such cases the law will dispose of his property, or in other words, the law will make a will for the person who fails to make one for himself or herself. This seems rather an easy way to avoid the making of a will, but after looking at the local statutes which provide for such distribution it may be found that the distribution made by the law is unsatisfactory and not such as the owner would consider wise or just.

§ 12. Rules of Descent and Distribution

"Descent" is the legal term for the passing of the real estate of a man who dies without devising his real property.

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"Distribution" is the legal term for the apportionment of a man's personalty when he dies without making a will.

The laws in each state that regulate both of these matters are called the "statutes of descent and distribution."

Before the personal property is distributed or the heir can inherit the land, the outstanding debts and obligations of the deceased must be settled in full. Debts and claims must be paid from the personal property if it is sufficient in amount to satisfy them. If the personal property is not sufficient to do this, the land and real property, or enough of it to pay all claims, must be sold. It is only after the debts have been paid that the rules of descent and distribution apply.

Rules of Distribution. Upon the death of an intestate, after payment of all claims his personal property is distributed according to the regulations of the statutes of distribution in the states where the decedent had personal property. The rules of distribution for all the states would be much too voluminous to give here, but general distribution of personalty is as follows:

After payment of funeral expenses and debts, the wife or the husband receives one-third of the property outright—this is not the right of dower or of curtesy, which pertains to real property only—and the children receive the remaining two-thirds divided equally among them (*per capita*). If any of the children are dead but have left children of their own, the share of the dead child is divided equally among his children, who as individuals inherit *per capita,* but as a group inherit *per stirpes,* or by the family. If there are no children, but a wife is left, the estate is usually divided equally between the wife and the next of kin.

As an example of what happens in some of the states to personalty where there are no children:

In New York the widow takes one-half of the surplus and $2,000.

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In New Jersey the husband or the wife takes all the personal property.

In Pennsylvania the surviving spouse takes $5,000 and one-half the remainder.

In California and Oklahoma the husband or the wife takes one-half, and one-half goes to the next of kin.

In those states where community property exists, the husband or the wife takes all the personal property.

Where there are children but no surviving wife or husband, the property is divided equally among the children; and if there is neither husband nor wife nor children the estate is divided among the next of kin or their representatives. In each state it would be necessary to consult the statutes, but most of the states follow the foregoing rules. In some of the states the distinction between realty and personalty has been disregarded and both pass by the same rules.

Rules of Descent. Upon the death of an intestate, his real property passes in equal shares to his heirs, subject to his wife's right of dower, which is an annual income from one-third of his real property for her life. Real estate passes to the heirs in this way without coming into control of the administrators. In event of the death of a married woman, her real estate would in like manner pass to her heirs, subject, if there were children of the marriage, to her husband's right of curtesy, which is the right to all the annual income of the wife's real estate for life. In a few states this right of dower for a wife and right of curtesy for a husband have been abolished, and the survivor takes for life the income from one-third of the real property left by the other. This passing of real property to heirs by operation of law is known as "descent."

In the United States the general rule of descent is that all in the same degree of kinship share equally; i.e., if there were five children each would take one-fifth. This is called sharing *per capita*. Where any of the heirs are dead, the

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children of the deceased heir have his or her share of the real property divided among them. The descent here is *per stirpes,* that is, by the roots. In the case cited, if a brother were dead and had left one child, it would have a full share, or one-fifth of the estate. If another brother died and left four children, each of these would get one-fourth of a fifth, or one-twentieth of the estate.

It is to be remembered that it is only in case of intestacy—that is, where there is no will—that these rules of descent work. In some states the rules of descent have been varied, and in cases where there are no children there is variation in the law as to who takes title.

§ 13. Appointment of an Administrator

The person appointed by the court of probate to settle the estate of a person who dies intestate receives letters of administration authorizing him to settle the estate, and is called an "administrator," or, if a woman is appointed, an "administratrix." Such a court will not grant letters of administration unless the deceased had property in the county or was a resident therein at the time of his death. If a person presumably dead at the time letters were granted, is later proved to be alive, the appointment is without jurisdiction. So too, if letters were granted in ignorance of the fact that there was a will.

Presumption of Death—Proof of Death. Before any step can be taken in the settlement of an estate, it must be proved that the person whose estate is to be settled is in fact dead. Where no actual proof can be obtained, the court will accept certain facts as presumptive death. For the purpose of this latter rule, it has been settled in the majority of the states that when a party has been absent seven years since any information concerning him has been received, he is, in contemplation of law, presumed to be dead.

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The first step in the settlement of the estate of one who leaves no will is the filing of a petition by some interested party, an heir, next of kin, or a creditor, who sets up the death of the intestate, the fact that he died intestate, and that he left property which should be administered subject to the jurisdiction of the probate court that is petitioned to administer. The petition should also state the amount of property so left and the names of the persons entitled to inherit it, and ask that the petitioner or some person having a prior right be appointed administrator. Anyone who has not an interest in the property of the decedent may not make such a petition to the court. Usually a relative makes such a petition, but an unpaid creditor is considered to have such an interest in the settlement of the estate as to entitle him to ask for the appointment of an administrator. In some cases he himself may be appointed.

After a petition has been filed by an interested party, a citation is issued by the probate court notifying all other interested parties of the petition, so that if they desire they may object to the granting of letters as asked, and may ask for another appointment.

A petition for administration should be brought within a reasonable time, and in some states a specific time is set, after which a delay in bringing such petition must be satisfactorily explained.

A husband or a wife has the first right of administration. The misconduct or incapability of a husband or a wife will be a bar to his or her appointment. In the United States the courts will, for the most part, grant letters to a surviving wife in preference to children or the next of kin.

After a wife's or a husband's right to the appointment comes the right of next of kin. Next of kin are those persons related by blood, who would take the personal estate of one who dies intestate, and this includes persons claiming *per stirpes*, or by representation.

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The court, if possible, will grant letters to some one next of kin who is a distributee under the Statute of Distribution, which designates the order of preference among kinsmen. As between next of kin with equal rights in the distribution of the decedent's estate, "moral fitness and integrity may well be considered in the selection; also efficiency of mind and body; also business habits and experience in the management of estates." [1] Sex and age also count to some extent and therefore, all else being equal, a male might be preferred to a female or an older person to one younger and less capable.

If there is no wife or husband, or no relative to be appointed, the court may at its discretion appoint a stranger, both in blood and interest, as administrator. In these days such appointee would probably be a trust company or a bank authorized to act as administrator. (See Chapters XII and XIII.)

§ 14. Public Administrator

In some states, what is called a "public administrator" is appointed in each county for the purpose: (1) of administering the estate of any decedent where there is no person entitled and willing to administer; or (2) of acting as conservator of the estate in certain cases, while the court is ascertaining to whom administration ought to be confided.[2]

In New York a public administrator is appointed for the county of New York and county of Kings. This official when authorized by the surrogate takes over entire charge of the personal estate, corresponding with husband or wife, or any relative, if such can be found or may later appear, settling and distributing the personal property according to the statutes of the state, and turning any property of an absent distributee or any unclaimed surplus of the estate into the state treasury

[1] Schouler, Wills, Executors and Administrators, Vol. II, p. 1104.
[2] Tessup, Surrogates' Practice, p. 633.

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to await the rightful claimant. In New York City, the property of an absent distributee would be placed in charge of the City Chamberlain. Such an administrator is absolutely reliable because he is at all times under the careful scrutiny of state and probate court executives, who fix the amount of his bond, and his records and accounts are regularly examined. His bond may always be examined as to its sufficiency, by a creditor or other interested party, and furthermore his bond of office does away with the necessity of finding bondsmen for many various estates. In other counties of the state, the county treasurer is authorized to act as public administrator.

Practically all the states now provide for a stranger to become the administrator of a decedent's estate where there is no one else, but, as in New York, the states of Louisiana, Alabama, Georgia, Wisconsin, Missouri, Illinois, and California, expressly provide for a public administrator to fill such position in times of necessity instead of a stranger selected specially for each case.

The public administrator performs the same functions and has only the same powers as an ordinary administrator, but more than this, he is a representative of the state and likewise of all persons interested as distributees in the administration of the decedent's property.

§ 15. Letters of Administration

If the death of the party is proved, if it is shown that there are assets of the estate in the county where letters are sought, if there is no will, and if the proposed administrator is not unsuitable or disqualified, the letters usually are issued as a matter of course. The court then asks for a bond, the amount of which is determined by the size of the estate the administrator is to handle. This bond must be executed and filed before letters will be issued. A bank or a trust company acting as administrator is not required to give bond, it being considered

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that such institutions are as financially responsible as any bonding institution could be.

Letters of administration will then be issued and will be authenticated under the seal of the court. Certified copies of the letters of administration will also be put on record at the registry of the probate court where all such papers and letters are kept. They are general in terms and grant administration of all goods, chattels, and credit belonging to the intestate. A copy certified by the clerk of the probate court is customarily used by the administrator to prove his authority to act for the estate.

Review Questions

1. What does "intestacy" mean? What other words are we using from the same root? In what four ways may a man be intestate? What happens to the property of an intestate?
2. Who has the first claim on a man's estate? How do most states distinguish between the disposition of real property and the disposition of personal property? Is this distinction made in your state? What is the legal distinction between the words "descent" and "distribution"?
3. In your state, when a man dies intestate what is done with land in the following cases:
   (a) When he leaves a wife and children?
   (b) When he leaves a wife but no children?
   (c) When he leaves no wife but children and grandchildren?
   (d) When he leaves a wife and brothers and sisters?
   (e) When he leaves a wife, a father, and brothers?
4. In each of the five cases, would it be different if a woman died leaving or not leaving a husband and relatives as has been described in Question 3?
5. In your state, what would be done with personal property in cases like those given under the two preceding paragraphs? What is meant by inheriting *per capita* and *per stirpes*?
6. In cases of intestacy, who distributes the property of the intestate? Who appoints an administrator? What facts must be shown to

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give the probate court jurisdiction in any particular case? What qualifications must an administrator have? What are the advantages of appointing a trust company administrator?

7. Is there a public administrator in your state? If not, what is done instead in cases where no relative is qualified to act?
8. What gives an administrator authority to act? How should he prove his authority to take the cash in a checking account?

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CHAPTER III

MAKING A WILL

§ 16. Who Can Make a Will

It is necessary to have a sound and disposing mind in order to make a valid will. It is presumed that any sane man or woman, not a minor, has capacity to make a will. A married woman has the right to make a will, but in some states she must recognize her husband's right of curtesy, i.e., his right to a life estate in her land if a child has been born. In like manner, a married man is limited in making a will by his wife's right of dower in any real estate he may own.

In many states one can make a will of personalty at a younger age than he can a will of realty. In New York a boy eighteen years of age may make a will of personalty, and a girl sixteen years old may do the same. This does not seem sensible or logical, but it is law. In some few other states minors are allowed to make wills. A person, by consulting the statutes in his own state, may ascertain exactly what powers in this respect are given to married women and children.

The usual incapacities by reason of which wills may be set aside are insanity, feeble mindedness, drunkenness, fraud, and undue influence.

An insane person may make a good will in a lucid interval. An insane person whose insanity does not affect his business judgment may make a valid will at any time. An insane delusion may obsess a person without in any way affecting his capacity to leave his property by will. A will has been admitted to probate despite the fact that the testator believed in witches and witchcraft and other absurd hallucinations, it appearing that her belief in these particulars did not affect her

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ability to dispose of her property by will. On the other hand, where a testator believed that his wife and children had conspired to send him to an insane asylum and that they had tried to poison him, his delusions were held to have influenced his will and probate was denied. To decide exactly how much judgment an insane person may possess on the occasion of his making a will is not easy, and legal expositions on the subject are too voluminous to be given here.

The question of undue influence is likewise a difficult problem. The person who delays the settlement of his affairs until his last illness, when he is weak, in pain, and completely dependent on those around him, may easily execute a will that he would not consider making when in health. The mind works uncertainly then and it is easy to be unjust and resentful. It is also hard for a person weakened and under a strain to reason soundly or to resist artful importunity and subtle suggestion from those upon whom he is dependent. Where undue influence is suspected, however, it must be clearly proved before the court will set aside the will.

Thus, after death a will once made remains and cannot be changed. It is not invalid because it is prejudiced, unjust, harsh, and petty. The law never sets a will aside for such reasons. "The evil that men do lives after them."

Notes:

1. Make your will when you are in health and able to think clearly.
2. Never make a will when indignant because of some slight or misconduct on the part of a relative.
3. Do not make a will when sick, unless to right a wrong or to prevent an injustice.

§ 17. Why a Will Should Be Made

If a man dies intestate, that is, without leaving an effective will, the laws of his state prescribe how his property shall be

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apportioned among those whom he leaves behind. The law necessarily has to work by general rules. Many men die leaving wives and minor children. The aim of those framing laws is to do what seems best for the general average of such cases. It would seem, though, that an intelligent father knowing all the circumstances would in every such case be able to plan better than the law, which merely strives to do what is best for the average family. It is not difficult for any man to find out what disposition of his property the law of his state will make in case of his sudden death. The question for each man to consider is whether or not he can better the state's disposition of his goods. Here are some points worth careful consideration.

1. When a man makes a will, he should first take the business ability of his wife into consideration. Is she competent, as executor, to handle the estate properly, or would it be safer for all concerned to appoint some financial institution executor and trustee to pay the income over to her month by month? Has she already property in her own right? If she marries again, should the property be tied up for her sake or for the sake of the children?

2. How old are the children? How expensively are they to be educated? Would it be well for the mother to have the added authority that control of the finances imparts? Is it desirable that each child should have his or her share on coming of age? Should not the mother be made financially independent while she lives?

3. What is the amount of the estate? Is it in shape to be left without change? What changes might be made in view of the possibility of death? What income is it likely to yield in days to come? Can the family continue to live as at present? Can they occupy their present home? Must any business now yielding income be wound up or sold out?

In each individual case these questions could be expanded.

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A prudent man having in view the uncertainty of human life will look ahead, and as far as possible devise a will simplifying affairs for those he leaves behind. When a family is broken up by the death of its head, it is sure to be difficult for unaccustomed hands to take hold of tangled and complicated business matters, and, as far as a well-considered will can make things easier, it should be carefully worked out and executed.

Further, we can see but a little way into the future; a prudent man will therefore execute a new will whenever important changes come in his circumstances and in the situation of those about him. Deaths, business changes, the birth and development of children, all these may necessitate change after change in one's will. A will is really easy to make and easy to alter, and it should be rewritten from time to time so as to provide for things both as they are and as they seem likely to be.[1]

Notes:

1. In his last will a man should express the best part of himself.
2. A will should be planned to do the most good for those who are left.
3. A will gives a man his last chance to show his love and care for those dependent on him.

§ 18. Employing a Lawyer to Make a Will

Drawing up wills is part of the work of a lawyer. Generally, every will should be prepared and executed by a competent lawyer. It should not be done hastily, and the details of execution must be done exactly as the law prescribes. A simple will, such as is given in § 19, whereby all of one's property is given to one person and that one person is made sole

[1] See the will of Grover Cleveland (Form 3) for an example of a fair, kindly, well-thought-out will.

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executor, can be copied, and if the will is executed according to the law of the state in which the testator lived, and if there is no real estate in other states, it will probably be admitted to probate and the executor will take the estate.

It is rarely, however, that so simple a will is desired, and almost any variation introduces legal questions that a layman cannot answer. Note in Form 17, the questions on material for making a will and how much is involved in stating all of these in due legal form.

The man who makes his own will is supposed ultimately to make much business for the legal profession. Lawyers themselves have often failed in drawing their own wills. Samuel Tilden, lawyer and shrewd man of business as well, blundered and failed to draw a will to dispose of his own great property as he desired. A man rarely sees his own affairs as a disinterested outsider would. It is better to pay a competent lawyer and have a will that holds than to risk having all your intentions come to naught, your property fail to go where you wished, and your family plunged into countless unforeseen difficulties.

In this connection it may be said that it is always proper to inquire what a lawyer expects to charge. No lawyer can tell what a proposed lawsuit will cost, because no man can know the end of litigation, but it is not hard to state the probable cost of drawing up a will and attending to its due execution. Of course, if there are many changes or many consultations between lawyer and client the charge will be higher than that quoted and this should be expected. A lawyer would always rather talk over the matter of charges with his client and have an understanding than wait till the work is done and then have his client aggrieved at the amount of his bill. If the lawyer consulted is not one with whom a matter of this kind can be talked over in a friendly way, it would be well to look for another lawyer.

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In Form 17 is given an outline for getting together the material for your will.

Notes:

1. Draw up memoranda of what you desire done with your estate after your death.
2. Try to put yourself into the place of your principal legatees, and to think how each will be affected.
3. When your memoranda are complete, take them to a lawyer to draft your will.

§ 19. The Form of a Will

The rules for drawing up a will are simple; in fact it is easier to execute a will than a deed. If all the property is to be left to one person, a few lines will suffice. A will may be written, printed, partly printed and partly written, or typewritten. The following lines show how simple a will may be:[2]

> This is my last will. I give, bequeath and devise to my wife, Leita M. White, in complete and perfect ownership, all my rights and property of every kind and nature, whether real, personal or mixed, wherever situated, appointing her executrix of my estate without bond and giving her seisin thereof.
>
> *(Signed and attested in due form)*

The formal introduction is for the purpose of giving the solemn character of a will to the instrument that follows. It is not, however, a hard and fast formula. It should be used so that there will be no doubt of what the writing is intended to be. It will read something after this fashion:

> I, Harvey Walters of Oswego, New York, being of sound mind and memory do hereby make and publish this my last will and testament.

[2] Will of Justice White of the U. S. Supreme Court, by which he left an estate of about $150,000 to his wife, in an instrument consisting of only fifty-one words.

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Then follows the body of the will:

> I give to my wife, Sarah Mason Walters, all property of which I die possessed, lands, moneys, goods and choses in action, and appoint her my executrix without bond.

The body of the will in this case is short and simple because the disposition of the property is plain and absolute.

Then come the signature and the seal:

> In Witness Whereof, I hereunto affix my hand and seal this 23rd day of October, 1920.
>
> HARVEY WALTERS (L. S.)

The signing, sealing, and declaration that it is his will must be done by Mr. Walters in the presence of the witnesses, and he must ask them to sign it as witnesses.

Last comes the most difficult portion of a will—the attestation by witnesses. The lawyer in charge may say, "Mr. Walters, is this your will?" and he will say, "Yes." The lawyer will then ask, "Do you wish Mr. Martin and Miss Henderson to sign it as witnesses," and he will say, "Yes," or "I do." Then the witnesses must sign it in the testator's presence and in the presence of each other.

> Signed, sealed, published and declared by the said Harvey Walters in our presence as and for his last will and testament, and we in his presence, and at his request, and in the presence of each other, have subscribed our names as witnesses.
>
> JOHN T. MARTIN,
> 144 South Adams St., Oswego, N. Y.
> MARGARET MAY HENDERSON,
> 235 Lansing St., Oswego, N. Y.

In Connecticut, Georgia, Maine, Massachusetts, New Hampshire, South Carolina, and Vermont, three witnesses are required to sign a will, but in the remaining states only two witnesses are necessary.

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If a legatee acts as a witness, he forfeits his legacy.

If real estate is left by will, the law of the state where the property is situated governs the will.

When property is left to many persons, and where there are conditions and limitations, a careful lawyer should always be employed.

Notes:

1. The will given in this section is simple because one person takes all and is sole legatee, devisee, and executrix.
2. Unless the wife is a capable business woman, she may have much trouble under such a will.
3. Few men are so circumstanced that such a will would be safe or expedient.

§ 20. Essentials of a Will

The form given in the preceding section shows a simple will, in which few mistakes could be made. In considering a more extended and complex will no standard form would be worth giving, but certain rules or essentials may be pointed out, some of which will be enlarged upon.

1. The testator must be competent.
2. The will must be in writing, signed and sealed by the testator, "in such a manner as to make it manifest that the name is intended to be a signature."
3. It must be witnessed in due form and by the proper number of witnesses.
4. The witnesses must not be legatees.
5. The witnesses should be younger than the testator.
6. Perpetuities, or arrangements to keep property intact forever, are illegal.
7. A capable executor who is willing to serve should be named.

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8. No alteration should be made in the will itself, but any changes should be made by codicil or by drawing up an entirely new will.
9. A will should be kept in proper custody so that there is no danger that it will be lost, destroyed, or tampered with, and it should be where it can be easily accessible when needed.

Signature or Mark of Testator. The general rule in this country is that the testator shall sign at the end of the instrument in the presence of his witnesses and at the same time declare to them that the instrument is his last will and testament.

Where the testator is unable through either physical or mental disability to write his name he may "make his mark," that is to say, place a crossmark (X) in place of his signature. Such mark will always, in the absence of fraud, be accepted as a valid signature, but anyone who is able to sign his own name should always do so, for the burden of proving a will with no written signature is not light and a mark often presents difficulties to those seeking probate.

Position of Testator's Signature. In the majority of our states, the statutes say nothing in regard to the position of the signature of the testator. It is considered that wherever the signature or name appears, if it was meant to stand for his final signature, the instrument is to be accepted as a valid will.

In New York, Pennsylvania, Ohio, Kansas, California, and Arkansas, however, the statutes demand that the signature appear at the end of the will, no matter how many times it may have appeared before in the body of the will.

Agent Signing for Testator. A subscribing witness may, at the request of the testator, sign his name for him. Having done this, he must so state after his signature as subscribing

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witness. Any third party designated by a testator may also sign for him. This is generally, throughout the country, considered a valid procedure. Where a testator signs himself by having another party guide his hand, it is always considered as his own signature, and no statement need be made by a witness.

In New York and New Jersey, the statutes require that the testator at the time of the signing by the witnesses shall also expressly declare that it is his last will and testament. In signing deeds it is common for a man to sign and then later to ask a friend who knows his signature to witness it. A will witnessed in this way would have no validity. In New York and a majority of the states a signing by the testator after the witnesses have signed would not be considered a legal execution.

Attestation Clause. The attestation clause is a statement assented to and signed by the subscribing witnesses to the effect that these witnesses saw the testator sign the will and that they, in the testator's presence and in the presence of each other, at his request signed their names. Any will subscribed by a less number of witnesses than is required by the statute will be void. If a legatee acts as a witness, the will is good but he forfeits his legacy.

Holographic Wills. A holographic will is one written entirely in the testator's handwriting. In New York and Massachusetts, such wills have no special privileges and must be witnessed as any other will. Under the statutes of a few states, such as California, Texas, Louisiana, and Mississippi, the attestation of subscribing witnesses is not required on a holographic will. It must, however, be entirely written, dated, and signed by the testator, to come under the provisions of the statutes. It has therefore been held that a will written on a printed form cannot be considered a holographic will.

Nuncupative Wills. A nuncupative will is one made by

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word of mouth to two or more witnesses, usually written down later in as near the words of the testator as possible. This form of will has never been popular with the courts because it is too conducive to fraud. At the present time in most of the states these wills may be made only by soldiers in the performance of their duty and mariners on the high seas. The term "mariners" includes sailors of the United States and all seamen in mercantile service. Even where such wills are allowed, they take effect as to the personal property of the decedent only, and have no effect on the realty, which passes by law to the proper person.

§ 21. Choosing an Executor

In choosing an executor, someone should be selected who has good judgment and business experience, and who can afford to give the time and thought needed. The task has become more difficult of late years, as income and inheritance taxes increase the complexity. It is wise to make sure that the man to be named can and will give the time and care required and that he is willing to act. If the executor named declines, it may be difficult to find another friend to act, and it may end in the court appointing a stranger to you and your family to wind up your affairs. When you can select someone of tested integrity and business ability, who already knows something of your affairs, and who by ties of blood or friendship is closely in touch with your family, it is more likely to work out well. It is to be remembered that you are imposing no small burden on your friend, and that if he is a busy man he may not be able to attend to it and his own affairs at the same time. In New York the legal fees for an executor who handles an estate with $50,000 of personal property would be less than $700. In some cases testators recognizing the fact that the legal fees may not be adequate compensation for the service to be rendered, make a liberal bequest in lieu

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of the legal fees. It is also to be remembered that if you name someone of your own generation that he may die before you do, or may die before he has settled the estate, and it is therefore best to appoint an executor somewhat younger than yourself.

Because of these conditions many men prefer making a bank or a trust company their executor. Such an institution can work to better advantage as an executor than can an individual. If it is desired that a friend who knows something of your affairs should act with the bank or the trust company, that can easily be managed. Some friend of the family, familiar with the circumstances, can readily advise and furnish the personal touch that might be lacking if the financial corporation acted by itself. This subject is considered more fully in Part V, which is written from the banker's viewpoint.

The duties of the executor may be summarized as follows:

1. To prepare an inventory of all the personal property of the estate.
2. To take possession and care for that property.
3. To pay the expenses of administration, funeral expenses and debts owed by the testator.
4. To distribute the balance of the property in accordance with the terms of the will, not omitting to set aside any trust funds that may be specified.
5. To account to the court of his appointment, presenting a report showing the cash and property which he has received, the disposition which he has made of it, and the balance, if any, on hand.

Thereupon the court will determine the commissions due the executor, will authorize him to retain for himself the amount of his commissions together with an amount fixed by the court to reimburse him for the cost of the final accounting, and will order him to distribute in accordance with the

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court's directions the cash and other estate assets then remaining in his hands.

The same rules will apply to the administrator except that for (4) will be substituted the rules resulting from the condition of intestacy.

§ 22. Custody of a Will

A will after due execution may be kept in a safe or a safe deposit box, or may be turned over to the testator's lawyer or banker for safe-keeping. In some places provision is made for filing wills with the clerk of the court of probate or other public official.

A copy of a will should be preserved by the lawyer who prepares it, or by the testator, or by both. This copy should be made after the will has been signed by testator and witnesses. Sometimes wills are prepared in duplicate so that each copy is an original. In such case it may be required that both copies be presented for probate, or otherwise, that the absence of one be explained. This is sometimes difficult to do.

In some states a safe deposit box may not be opened after death until an executor is appointed or an order from the court of probate obtained. In some states a representative of the State Tax Department must be present when a safe deposit box is opened after death. It is probably safest to put an executed will in charge of a responsible lawyer, a banker, or an official authorized to receive it, if there is one. The testator should keep his own copy and also a memorandum as to where the original is to be found.

§ 23. Adding a Codicil to a Will

A codicil is an addition to a will. It may be written on the same sheets as the will or it may be a separate instrument. It should be headed "Codicil," as the term defines its function as an addition to an existing will. It must be signed, sealed,

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and attested in all respects as is an original will. It should refer plainly to the date of the will it supplements. (See Form 5.)

If a codicil changing a will is duly executed and later this codicil is revoked, the part of the will that has been changed may remain changed unless a new codicil re-executing that part of the will is executed. The decisions on this point are conflicting, and it is better not to take chances.

§ 24. Revoking a Will

The simplest way to revoke a will is to execute a will of later date, with this statement in the preamble: "..... hereby revoking and annulling any and all wills heretofore made and executed by me." Then the signature to the old will should be canceled and a memorandum written on the old will, in the writing of the testator, stating that he has revoked it on the date of the new will.

A will may also be revoked by the testator burning, tearing, obliterating or canceling it, or he may direct someone else to do this in his presence. If a testator destroys a duly executed will and leaves no record of the fact of destruction and dies without making a later will, it may be supposed that the will has been lost or destroyed by someone else, and a carbon copy or rough copy may be secured and proved as a lost will. (See § 41, "Proving a Lost Will.")

A will may be revoked by the execution of a codicil of revocation duly signed, sealed, and witnessed in all respects as the original will.

A number of dubious things are sometimes done by testators that leave the revocation of wills or the reinstatement of prior wills uncertain, and cause litigation of much interest and profit to the legal profession. It is easy to make a will, to change it by codicil, or effectually to revoke a will that has been executed, and instructions for the performance of

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such acts have been given. Space does not, however, permit a comprehensive discussion of all the curious things that testators sometimes do in connection with their wills, and the uncertain legal effect of such actions. Likewise it is always necessary to inquire as to the effect of marriage and the birth of a child, etc., if such events take place after the execution of a will.

Notes:

1. Make, change, or revoke your will while you are sane, in good health, and at peace.
2. If you have done this, do not alter it or make a new will when you are on a sick bed.
3. A revocation should be complete, and a written memorandum of such revocation should be made and preserved.

§ 25. Well-Considered Wills

Few people give adequate consideration to making their wills, or advise with those competent to aid them in wisely apportioning such worldly goods as they possess. A will should be planned when one is at his sanest and clearest. It should be thought out when one is well and kindly disposed, and not when one is weary, sick, sour, and disheartened with the general perversity and folly of the race.

It is a sorry thing to write into a will the small antagonisms, the petty prejudices, and the long remembered slights of kith and kin. Too often this is the case and the testator provides hard thoughts to live after him for long years.

Again, to make a good will requires judgment and far-sighted care for the future. Adding to the wealth of those who have plenty is not so good as helping those who are trying to make their own way, educating children who are worth educating, helping to build up independent businesses

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for those who are capable, and helping those who are in the class that aspire and to whom a little help at the right time would mean a good deal.

The claims of the immediate family most men are willing to recognize. It is well to consider what income will be available; how the principal should be preserved intact; in what cases money and property should be left outright; and in what cases only the income should be paid over, and if so, for how long. It is not always well to try to look out for other people's fortunes for the far future.

The law in its distribution aims at equality because that is the best general rule. The father of a family should be able to do better than this. The daughter who has married a money maker and has a small family should not expect nor receive so much as her sister who has espoused a college professor and has five children to educate.

The testator who provides that his accustomed contributions to educational, charitable, and religious causes shall continue for at least the year after his death, does a helpful thing.

Those who can afford to leave gifts to worthy causes might distinguish between those things that each generation should provide for itself, and things of enduring value to mankind. A large gift to the congregation of a present-day church would merely relieve the members who should and would keep it up as part of their duty. The same money given to some vital present need—food for hungry people, education for ignorant people, and such civilization and religion as we have for those who have less—would seem productive of greater good.

Many people have an ambition to found some charity, a school or a library that shall bear their own name. If such people would look into the history of such small individual foundations, and see how rarely they are effective and how prone they are to be mismanaged and to be taken possession

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of by a small self-perpetuating group of officials, they would prefer to give to some strong, well-managed organization that is sure to apply the gift to good purpose.

Another consideration is that the world is in an endless flux of change. It is a question how far money should be tied up in any long-time endowments. Many old foundations for charity, education, and religion now sustain a few drones who are contributing little to the betterment of present-day conditions. Money may well be spent today in buildings and teachers for the work that needs doing today, while future generations may be trusted to provide for the buildings and teachers required for the next century.

Review Questions

1. In your state, who can make a will? Who cannot make a will? Is the right to leave property to charity restricted? To what extent? What rights, if any, has a wife against an adverse will? What rights, if any, has a husband against an adverse will? Can a child or children be disinherited by will? What are the usual reasons for which wills are set aside?
2. Why should every person make a will? Is it simpler to settle an estate with or without a will? Should a young man make a will? In your state can a man provide better for his wife if he makes a will? What would your state law do with your individual property in event of death? Could you leave it more fairly by will?
3. How is a will made? Why are the services of a lawyer usually necessary? May a will be typewritten? How many witnesses are required in your state? A, who owned a valuable summer home in the Berkshires in Massachusetts, made his will in New York, where he lived, and had it witnessed by two witnesses. He left his summer home to his only sister, providing otherwise for his wife and children. How would you ascertain what would happen to the summer home?
4. What are the essentials of a will? Is there any prescribed form

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for a will? Where should the signature be? What if the will were attested the day after it was signed? What if the witnesses signed separately? What if a clause in the will were crossed out? What is the effect of having a legatee act as witness?

5. In selecting an executor, what qualities would you seek? Why is the task of an executor an onerous and difficult one? What advantages has a banking institution for this sort of work? Can an individual and a bank work together as executors?
6. What do people usually do with their wills after making them? What objections are there to putting them in a safe deposit box? Does your state provide for filing wills for safe custody with any public officer? Where should a will be kept?
7. What is the purpose of adding a codicil? Is there any reason for preparing a new will instead of adding a codicil?
8. How may a will be revoked? What is the effect of a later will? If a testator has two wills in existence and destroys the later one, is the other will revived? What circumstances will revoke a will, and to what extent?
9. What motives should influence a man in making his will? What kind of will is most likely to be approved by a court of probate? How can a man make sure of his will being held good? Is it easy to break a will?

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CHAPTER IV

COMMON MISTAKES IN MAKING WILLS

§ 26. Procrastination

In making wills, possibly the most common mistake is to put the task off too long. Everyone should insure his life, but probably 90 per cent of those who do insure would postpone indefinitely if it were not customary in the insurance business to employ pertinacious and persistent salesmen to harass and follow up every man who should insure and give him neither peace nor time to attend to his own affairs until he consents to take all the insurance he can carry. It is equally important to make a will. Both the insurance policy and the will are proper and prudent preparations for what will come as surely as taxes. But no one is sufficiently interested in bringing the matter home to the 90 per cent who put off making their wills, and these let the matter go "until a more convenient season." At last, when weakened by sickness and physically and mentally unfit even to contract intelligently for a player piano, much less to make a careful and long-sighted disposal of all their worldly affairs, they make a hurried and ill-considered will.

Men object to the thought of death, and to the young man it seems far enough away. The insurance agent fights this tendency and tells tales of sudden death and bereaved families left helpless. All of these arguments apply equally well to making a will, but no one is paid to go round and tactfully and tirelessly stir the dilatory to action.

If one has but little he should make sure that it goes where it will do the most good, and is not tied up by the law until

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children come of age, or in other ways made difficult to get at and utilize for pressing needs.

If a man does not know what will happen to his property when he dies, he should find out. If he finds that he ought to make a will to help those whom he leaves behind him to get the most good from his estate, it is his duty to execute a will forthwith.

Notes:

1. Do not superstitiously believe that making a will shortens your life.
2. Find out exactly what will happen to your property if you are killed in an auto smash next week, leaving no will.
3. Do not put off making a will until it must be hurried through or left unmade.

§ 27. Complexity of Provisions

The writer of one of the best modern texts on wills says:

> In these days the safest will is that which deals justly by the natural objects of one's bounty and distributes in a simple manner; attempting little beyond limiting property so as to give the income to some person for life, with capital over on his death, if limiting at all. If your estate be a small one and the beneficiaries needy, all the more should you make a simple will and not attempt complex dispositions.[1]

The wills given in Forms 3 and 4 are likely to effect just what the testator wished, because they are clear, because they go into immediate effect, because nothing is contingent, and because the property goes where it naturally should go.

If the amount of property is not large, it should be easier to decide just where it should go to do the most good to the natural legatees of the testator. In most cases when the

[1] Schouler, Wills, Executors and Administrators, Vol. I, p. 842.

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amount of the estate is small and there are minor children, it should be left to their mother rather than have the children's share set off and placed in the hands of a guardian. There are of course cases where the wife is not skilled in caring for property, and then she needs a guardian as much as the children do. Most women though are more careful of money than men are and can be trusted to make small means go a long way. If a man's wife is of the type that does not make the most of what she has, it is a simple matter to put it all in the hands of a trust company or bank with instructions to pay her the income quarterly.

Notes:

1. If the property is small the will should be simple and should if possible go into immediate effect.
2. The object of a will may be to avoid the delay and tying up of the estate by the local statutes governing distribution.
3. The object of a will may be to tie up the estate so that the income may be used and the principal kept intact.

§ 28. Trying to Control Estate Too Long

The creation of perpetuities, or the tying up of estates for long periods, is not favored by the law. A wealthy man in England, named Thelluson, left nothing to his immediate heirs, but bequeathed all his property to a board of trustees to accumulate the income and finally, after many years, to turn the vast aggregated fortune over to one representative of the family. If the will had been carried out along the lines laid down, the final legatee would have been the richest man in all England. The highest courts decided that any such perpetuities or long extended trusts were, as the law stood, legal. But then Parliament intervened and, on the ground that it

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was to the interests of the nation that estates should not be kept together save for limited periods, passed what is known as the Thelluson Act, which curtails the period during which estates can be kept intact. The same general principle prevails throughout this country, and all attempts to create accumulations, or perpetuities, or to keep property indefinitely in one family, are limited in all the states.

The usual rule is that an estate may be kept together for "a life or lives in being" and twenty-one years thereafter. That is, a man can leave his property to trustees to pay the income to members of his family during their lives, and to their heirs or descendants for twenty-one years longer, after which period it must be distributed to those who are to keep it. At the expiration of twenty-one years after the end of the last life named, the trust must end and the property be given absolutely to some person or persons. The testator's control must terminate at that point.

Practically, unless a man's heirs are insane, incapable, crippled, or in some other way incompetent, it is rarely wise to tie up property longer than is necessary for children to come of age. The wisest man cannot foresee the future, and the next generation can best be left to solve its own problems.

Mr. Dooley travesties the fondness some men have for managing for those who come after them as follows:

> All me money I lave to me faithful frind, th' Confidintyal Chattel Morgedge comp'ny, which I command to disburse as follows: to me devoted wife, Belinda Ann Snivvy, shall be paid the sum iv four hundred dollars per annum, undher th' followin' conditions: That she shall niver marry again; that she shall wear a black veil f'r th' rest of her life in me honor; that she shall go to me grave wanst a week an' dew it with her tears; that she shall be sorry that she spoke to me th' way she did: . . .
>
> To me son Silas I lave th' use ive me horse and buggy an' two bags iv oats ontil he has arrived a th' age iv forty-

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five. If at that time he has shown a proper apprecyation iv th' trust, th' said property shall pass to his ownership undher condition that me name shall appear in letters a foot high on the dash-board.

Me sicond son Ephraim I have provided f'r already be lettin' him get himsilf a good job in a blacksmith shop.

Me son Elias, havin' offended me be goin' to a baseball game, I desire that he shall get nawthin' fr'm me estate.[2]

§ 29. Making Requests That Bind Legatees

It is common to phrase wills in this form:

I give to my wife Flora Adams all my stock in the Adams Manufacturing Company and all of my Pennsylvania Railroad Bonds and such other bonds and stocks as I may own at the time of my death.

I request my said wife from the income from said bonds to give to my sister Mary G. Adams the sum annually of $300 during her life.

I request my said wife to give my sister Anna B. McNeil from the income of my estate annually the sum of $500.

Requests so phrased are called "*precatory* requests" and are usually interpreted as giving the beneficiary an absolute right to the amounts. In such a case as is given the wife would be a trustee for the beneficiaries named. It would be better under such circumstances to use the word "direct" instead of "request," and leave no chance for a misunderstanding. If it is intended to be optional, it should be worded "I ask my said wife, in her discretion, to give," etc. It might be better, if it is intended to be entirely discretionary, to leave a private letter of instruction to the wife and to omit any reference to such requests in the will. Such a letter will have no legal force and will give the beneficiaries no legal claim upon her bounty. Many lawsuits have arisen from such loose expression of intent.

[2] On Making a Will and Other Necessary Evils, by Mr. Dooley.

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Note:

1. "Avoid if possible precatory words, and uncertainty in gifts and be careful as to creating conditions, limitations, remainders, etc." [8]

§ 30. Making a Will When Mind and Body Are Impaired

If a man were asked to transact any ordinary piece of business involving possibly only a few hundred dollars, he would not risk writing a letter or signing a contract when he was sick, in pain, or physically exhausted. Yet men again and again postpone making their wills until they are near the end. While courts are reluctant to disturb a will made under such conditions, they will do so if there is any evidence of irrationality. The real question is for the individual to say whether he thinks he can provide for those he wishes to look out for as well, when sick, weary, and sinking away from life and all its concerns, as when, free from pain and with unclouded brain, he sits in his office with the work-a-day world around him. Or, to put it from another point of view, if you were an heir or a possible legatee of some older person, would you prefer that he wrote his will while in good health, sane, and with a well man's outlook on life, or that he put off making his will until he was so sick that he expected never to recover? A man owes it to those he leaves to prepare a sane, careful, intelligent will, so that they have the least trouble and the most benefit.

When a man's body weakens his will weakens, his forcefulness departs, and his reason clouds over. Many painful cases have come up before courts of law where a man in his last sickness has been angered or importuned or cajoled into making a will desired by some pertinacious person who perhaps kept from him those who would have persuaded him otherwise. Other repulsive cases record how greedy rela-

[8] Schouler, Wills, Executors and Administrators, Vol. I, p. 842.

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tives have contended over a deathbed to convince a weak and dying man that he should or should not make a purposed will or proposed provisions in a will.

A will requires care, foresight, and good judgment. Therefore, make your will when you know that you can exercise these qualities, and having made it under these conditions, do not change it when you are not equally capable.

Notes:

1. Make your will when well, sane, and under no pressure.
2. Do not, when sick, in pain, or under the influence of others, change the will so made.

§ 31. Making Will an Expression of Vindictiveness

It would be thought that a will to be read and have its effect after the testator had gone from earth would be the last place for the manifestation to the world of his petty spites, small grievances, and old grudges.

Nevertheless wills in which such spites appear form the basis of many a story where the rich uncle cuts off his nephew in a fit of anger or in revenge for some piece of waywardness. Wills of this description are also found in real life, and the usual consequence of such action is either that the will is contested or that it is granted probate to bring unhappiness upon many people undeserving of such penalty.

The law gives the owner of property the power to will it to whom he pleases. The moral right to do this is very different from the legal power. When one is nearing the end he should desire above all things to be just and fair, but if he is bent on satisfying old grudges and getting even for real or imaginary grievances, he is not likely to be either. In such case, if wise he will counsel with some judicious friend before he makes a will that is to take lasting effect when he has died.

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> The right of a testator to dispose of his estate, depends neither on the justice of his prejudices, nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.[4]

Note:

1. Do not make your will the medium of showing those who come after you your spite, malice, and lack of charity.

§ 32. Making No Provisions for Deaths and Births

Somehow it usually seems to a testator when making a will, that all things will continue to be as they are, and so he fails to make provision for deaths and births among those in whom he is interested. As a matter of fact, every few years show changes and shiftings in any group. Hence, if bequests are made to people advanced in years, it may be best to qualifying them by adding, "if living at the time of my death." The same phrase should be added in the case of younger people if the gift is intended to be personal. If it is desired that the gift shall be made in spite of the possible death of the donee, the phrase used is "or to his heirs."

When property is left in equal parts to a family of children, there are two contingencies to be borne in mind: (1) one or more may die unmarried, or (2) one or more may marry, have children, and then die. In the first case, it is usually provided that the share of the one so dying shall be divided equally among the others of the group. In the second case, it is usually provided that the share of the deceased brother or sister shall go to his or her children. Sometimes it is provided that the share of the deceased member of the group shall go to his widow, unless she marries again, or, if

[4] Clapp v Fullerton, 34 N. Y. 190.

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the property be considerable, that she shall have the income of her husband's portion so long as she continues his widow, and upon her death or remarriage the principal shall be divided among the other members of the group.

With all legatees there are these contingencies: death, leaving neither wife nor child; death, leaving wife and children; death, leaving wife but no child or children; death, leaving children but no wife. The testator should decide what is to be done in each possible case, and make his will so as to secure the carrying into effect of his wishes.

It is not always borne in mind that the marriage of the testator and the birth of a child will render void any will made before that time. Marriage alone will not have that effect, but the wife would be entitled to dower in her husband's real estate and in many states the widow is entitled to a certain interest that she cannot be deprived of by will. To this extent marriage will nullify the will made before marriage. The birth of a child after a will is made nullifies the will to the extent that the child will be entitled to whatever portion the other children have. The statute law in many states provides that no child shall be disinherited unless mentioned specifically by name in the will.

Notes:

1. It may be well to execute a new will from time to time.
2. A codicil may be added whenever a change makes it necessary.

§ 33. Leaving Estate in Bad Shape

Usually the man who owns certain property is in the best position to care for it, to dispose of it, and to settle it. It would seem only ordinarily prudent for all men, and especially men getting along in years, to put their estates into shape to

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leave. It would likewise be prudent for men at all times to bear in mind the idea of keeping their property in such condition that if they themselves at any time should die those who come after will not have to do things that the owner should have done himself. There are times when men who are making their own way may be compelled to carry more outstanding liabilities than they themselves like. In such case, if they die and do not leave insurance enough to straighten out their affairs, the prospects for the welfare of their families are bad. Generally, the way in which a man would prefer to leave his affairs is the way in which he should want to have them while he is alive. Too many times executors have to close up at a loss matters to which the testator himself should have attended long ago. All of this, though, is too obvious to call for discussion.

Note:

1. Put your affairs in shape to leave. Then keep them so.

§ 34. Sundry Mistakes

Do not blindly copy someone else's will. There may be personal reasons why such a will would not work well with your estate and for your family.

Do not consult others as to the disposition of your affairs until you have made your own plan and have clear ideas as to how you wish to leave your property. Then consult wise friends, if you have such, and secure skilled legal advice. The man who draws your will should be more than merely a lawyer. He should be a wise, prudent man of business.

Do not name a man as executor who will not serve or who lacks time or business intelligence to do what has to be done. If there is doubt, or if your executor is likely to die before you do or to die before your estate is settled, name a younger man or appoint a trust company or bank.

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Do not have your executor or any legatee act as witness. Do not have for witnesses people as old as you are, for they may die before the time comes to prove your will. Secure witnesses who know you are sane and capable, for they may have to testify to this. Do not have a stranger as a witness if it can be avoided.

Do not put your will where it cannot be found, or where people who are not favorably disposed to your plans have access to it.

Do not try to change your will by alterations, interlineations, or crossing out parts after it is signed and witnessed. If you change it, do so by codicil, properly signed and witnessed, and referring to the will it changes, or by drawing up a new will. If possible, attach the codicil to the will.

If you are able to do more than provide for your family, do not forget the community in which you live and have made your money, and also those in the community who have not been able to play their part successfully, and who are helpless and dependent.

Do not forget that your wife has certain statutory rights and that unless you are giving her more than the law gives she has the right to elect whether she will take what the law gives or what the will gives.

Note:

1. We all make too many mistakes in our treatment of our fellows. Let us rectify any we can and make no more when we draw up our last wills.

Review Questions

1. What is the argument for making a will? Why should a man with but little property make a will?
2. Why is it better to have a will simple? Why do men give the

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income of estates and hold back the principal? Are testators usually wiser than those to whom they leave their property?

3. How long may an estate be kept together by will? What is the objection to perpetuities?
4. What is the effect of a request to a legatee to pay over money or property? How can more discretion as to gifts be given the legatee?
5. Should a man expect to be able to transact any business when he is in his last illness? Is he likely to make a wise, well-thought-out will under such circumstances?
6. Why should no ill feeling be shown in a will?
7. If a will is made, and in a few years, by births, deaths, and mutations of fortunes, the circumstances of the legatees are much changed, what should the testator do? A makes a will and leaves everything to his wife; in six years his wife dies leaving no children. Then A dies without making a new will. What happens to his estate?
8. A, who is a skilled real estate operator, dies leaving all to his wife and appointing her executrix. The last years of his life he bought much real estate, paying only part, and he built several houses, borrowing the money to construct them. It would take an able real estate man to straighten out all the deals and to turn the property into safe investments. What is likely to happen?
9. Is it best to secure legal aid to draw a will?

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CHAPTER V

PROBATING A WILL

§ 35. The Probate Court.

The probating of wills is cared for by special courts created expressly for this sort of work. These courts are known in the various states as probate, surrogate's, orphans', and prerogative courts, but their functions are the same. They are courts of record and of limited jurisdiction. In their own territory they have original jurisdiction over all matters relating to the probate of wills, the settlement of estates, the appointment of administrators, the appointment of guardians for orphans, and other similar matters. An appeal may be taken from the action of these courts, and they may be overruled by an appellate court. Where there is no regular probate court, a court of equity may take charge of all matters of probate jurisdiction, but where the proper court exists equity has no jurisdiction.

Probate courts are much less formal than the usual courts of law and equity. In most localities parties can appear personally or by agents, who need not be attorneys. Usually it is wiser to have someone familiar with probate procedure in charge. It is not reasonable to expect the probate judge or clerk to instruct an uninformed person as to the proper procedure. (See Form 6, which gives the rules of probate procedure in Maine, where it is simple and informal.) In some places probate judges are elected who are not even members of the bar.

The probate court usually has jurisdiction where the person whose will is to be probated or whose estate is to be

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settled was resident within the territory in which such court is situated. Wills of real property must be separately proved in the proper probate court in each state in which such real property is located, unless a statutory provision of any state dispenses with such probate in that state. Where the will is filed in one court and real or personal estate exists in other jurisdictions, a copy of the will certified to by the first court may be filed in the other courts.

If probate proceedings have not been instituted in the county of residence, the general rule is that administration may be granted on petition of a husband or a wife or a relative of the testator in any county of any state or territory where unadministered personal property of a deceased person is found. If personal property is not found to pay debts, the real property is subject to the claim of any creditor of the deceased, and administration proceedings may be instituted in any county where such real estate is found.

§ 36. Where a Will Is Probated

"Probate" means proof. It is the act of an authorized official declaring that the document offered as the last will and testament of a decedent is in truth such will. A will should be offered for probate at the court of probate for the county in which the testator resided and had his home. All transfers of personal property are governed by the laws of the place of the testator's permanent residence. If the will disposes of real property situated in another state or country, a copy of the will and its proof, certified to be a true copy by the clerk of the court where it was filed, must be filed in a probate court of the county of the state or country where the land is situated. If the land were in another county of the same state, a certified copy of the will should be filed in the probate court of the county or in the office of the county clerk or registrar of deeds for the county. In most parts

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of the country such authenticated copy of a will and its probate, when filed in a probate court, will pass title to land without further formality.

If it be necessary to sell land, or to bring suit concerning any personal property, or to collect claims in any foreign jurisdiction, what are called "ancillary letters of administration" can be taken out there. "Foreign" as used in this connection means in another county, state, or country. The place of death or of making the will has no effect as to the proper court in which to probate the will.

Usually personal property or money or claims in another jurisdiction can be secured by the voluntary action of those having possession without suit or ancillary administration.

§ 37. Who May Probate a Will

Sometimes a will is not found immediately. When it is found, the executor or executors named in it should present it without delay to the judicial officer who presides over the court of probate, or the orphans' court, or the surrogate's court, in the county in which the testator lived.

The executor named in the will may be dead, may be out of the county, or may be incapacitated. In such cases anyone who takes under the will may petition that the will be admitted to probate, or if such persons are remiss, a creditor may present the petition.

No one who has been made an executor under the provisions of a will can be kept from acting as such if he is competent; but he himself may reject his nomination or fail to appear at the probating of the will. If for any reason he refuses to serve as executor, he cannot be forced to act.

Anyone who is not interested under the will and is not a creditor cannot bring a petition for probate, and the proper person to bring such petition is an executor or executors, named as such in the will.

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In practically all the states it is a criminal offense for anyone to conceal or destroy a will in order to prevent it from being probated.

If the applicants have not possession of the will, they may describe it and ask that those having it in custody be cited to produce it for probate.

§ 38. How a Will Is Probated

A will should be presented for probate as soon as possible after the funeral of the testator, and thereafter any delay in the proceedings would be due to the proceedings in court and not to the fault of those whose duty it is to probate the will. In the United States no distinction is made between wills of personalty and wills of realty.

After a proper person has petitioned the court to admit the will to probate, a time is set for the proof. The petition should name the testator and the fact of his death, describe the will and name the residence of said decedent, state whether the will relates to real or to personal property or to both and give any other reason there may be for probating it in the county, give the proof of the jurisdiction of the court in the particular case, and specify the persons who are to be cited, with their addresses. (See next section.)

The time set for the probate is affected by the local statutes and the usage of the court. As notice of the hearing must be given to everyone interested in the settlement of the estate, it would depend in each state upon the time required to do this; in New York this may run from eight days to six weeks. This notice may be given by personal notice or by publication in a newspaper. The methods vary in different states, and each has a certain form in which such notice must be written. Unless the notice is given in the required form, those notified will not be bound by any subsequent proceedings.

Where all the parties concerned are of full age, they may

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waive formal notice and may unite in the petition for proof. Much time may be saved by this method where it is possible.

If the attendance of the witnesses to the will cannot be otherwise obtained, a subpoena can be had and attendance thus be compelled. Where the will is not contested, it may be probated on the testimony of only one of the subscribing witnesses. When the witnesses are outside the jurisdiction of the court of probate, a person, usually a notary public, is appointed in the place where the witnesses reside to take their depositions. If it should happen that the witnesses are dead or incompetent, or refuse to testify, the mental capacity of the testator and due execution of the will may be proved by other witnesses.

§ 39. Who Are Cited to Attend the Probate

When a petition asking for probate is filed, it also asks that a citation to all interested be issued by the court. This is an order to all parties who may be interested in the settlement of the estate to appear at the hearing and state the causes, if any, why the request of the petitioner should not be granted. It then sets forth the petitioner's reason for asking for a settlement of the estate.

Those to be cited are: (1) generally, all persons named in the will as devisees or as legatees; (2) all those who would have inherited any of the property if there had been no will. These last would be either heirs or next of kin.

Heirs are those who would take the real estate by descent. The word is also loosely used to designate those who would take any of the personal property by distribution. It will include in this sense a surviving husband or wife.

Next of kin include the nearest blood relations. In New York these are entitled to inherit in the following order:

1. Any children or their descendants.
2. The father.

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3. The mother, brothers, or sisters.
4. Collateral relations not further removed than nephews or nieces.

If there were children or their descendants living, it would not be necessary to cite any of the more remote kindred, and so on with each class.

If any of the persons cited be infants, the citation will state this fact so that they may be represented by their guardians if they have such, and if not, so that the court may appoint a guardian or guardians *ad litem* (during the suit).

A petitioner must state all necessary facts and must give the names and addresses of all the interested parties, to the best of his knowledge. The court when preparing the citations takes this petition as a working basis, and hence the need for accuracy. If, however, it should happen that some of the relatives or interested parties were not cited, and it could be proved that they did, in spite of this, have knowledge that an action for probating the will was pending, and they failed to appear at such time, they would be barred from any action contesting the probate.

Service of a citation may usually be made in three ways, namely: personally, by substitution, and by publication. Service by substitution is used where after diligent effort it has been found impracticable to serve the citation personally. In such case the order or a copy must be left at the residence of the person cited, with someone of proper age, or, if no one can be found to take the citation, by attaching the order to the door of said residence, and mailing another copy to the same address.

Citation by publication is where the person so cited is outside the state, or where after search the address of the person could not be ascertained by the petitioner.

It must, of course, be remembered that this is a general

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treatment of the subject of citations, and that it is a matter of procedure usually handled by the courts themselves and is for that reason liable to vary in the different states.

§ 40. Examination of Witnesses

On the day set for the hearing, all the parties having been duly notified, the witnesses will be examined as to the capacity of the testator and the legality of the will. If any of the parties desire to contest the will, they should interpose at this point. Where this is done the will is not admitted until such objections as may be urged by the contesting parties are tried and determined. A will contest may be a protracted and tedious proceeding.

If possible, all the witnesses should be in attendance. If they or any of them cannot be present or are dead, their signatures, and also the signature of the testator, may be proved by witnesses familiar with their handwriting, or their evidence may be taken by deposition. This is done by the court appointing a notary or some other responsible person in the place where the witnesses live to take their evidence, which is written out and verified and then sent to the court of probate.

The judge of probate must be satisfied by the examination of the witnesses that the will was duly executed by the testator, and that the testator was sane, competent, and not acting under compulsion or undue influence. Subscribing witnesses may give their opinion as to the sanity or insanity of the decedent, but do not have to give the facts upon which their opinion was based, for the fact that they are such witnesses is deemed to qualify them in this matter.[1]

As the witnesses when signing the will supposed, or are presumed to have supposed, the testator sane, their testimony to the contrary will have less effect than the testimony of others, not witnesses to the will, that the testator was sane.

[1] Williams v. Spencer, 150 Mass. 346.

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In most of the states, a person who is not a subscribing witness or an expert called in on the matter, may not testify unless he can show that his opinion is based on actual personal knowledge. In Massachusetts no one but an expert or a subscribing witness may testify as to his opinion.

The procedure as to the examination of witnesses, cross-examination, compulsory attendance of witnesses, admissibility of the evidence, etc., is governed by the same rules that are in force in other courts.

When the judge is satisfied as to all essential points, he will either order that the will be admitted to probate, or reject it and order an administrator appointed to settle the estate.

§ 41. Proving a Lost Will

A will that has been lost, stolen, or fraudulently destroyed may be admitted to probate. In such case a clear copy would count for much. The proof would have to be decisive. It might be proved by two or more witnesses, not necessarily subscribing witnesses, who could testify to both the original will and its contents.

It is held in some states that a will may not be established unless the entire contents can be given, and in other states it may be established where only part of the contents can be proved. The evidence in all cases of lost wills must be definite and certain.

Where the will was in existence at the time of the testator's death, and has since disappeared, it is obvious that such loss should not be allowed to defeat the testator's intention. In such a case the lawyer who drafted the will should produce his office copy, and his testimony and the testimony of his stenographer would probably be sufficient.

Where a will known to have been executed cannot be found after the death of the testator, the case is more diffi-

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cult. The testator might have destroyed it himself with intent to revoke it. For this reason a testator who desires to revoke a will should not destroy it, but should cancel it, or cut out the signature, and note on the will in his own writing the date and the fact that he himself has canceled it.

An action for proving a lost will is started by a petition setting forth the fact of the lost will and such other facts as are depended upon for evidence.

§ 42. Issuance of Letters Testamentary

If the judge of probate is satisfied as to the validity of the will, he admits it to probate, and if the executor or executors named therein are citizens of the state, of age and of good character, they will, on filing a bond, the amount of which is fixed by the court, be entitled to letters testamentary authorizing them to act in all matters relating to the settlement of the estate so far as personal property is concerned.

The executors of a person's will are, of course, appointed to the office by the testator himself. Such appointment, however, as seen above, is not final, but is subject to the supervision of the court. The court will take into consideration the character, ability, and willingness of the person designated to serve, and his citizenship in the state, and also the willingness of the interested persons to have him serve in such capacity. Once decided as to these points, the court will issue letters testamentary, or a document to the same effect showing the approval of the court and the fact that it confirms him as an executor.

Before the issuance of letters testamentary it is the executor's duty to do everything necessary to preserve the estate, but he has no power to dispose of any part of it except in the payment of funeral expenses. He should give notice of the death to life insurance companies in which the deceased had policies. Ordinarily he takes the initiative in getting the

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will admitted to probate, but any interested person is equally entitled to do so. Receipts given to debtors of the estate by the executor before the issuance of letters testamentary are valid and release the debtors, but the executor cannot require payment before letters are issued.

Review Questions

1. In what court in your state is a will probated? What are courts such as these called? When does a probate court have jurisdiction? What else besides probating wills do such courts do? Is it necessary to be represented by a lawyer?
2. What is understood by the "probate of a will"? Where should a will be proved? What should be done if there is a farm in another state? If the farm is situated in another county of the same state, what would be done? What are ancillary letters of administration? When are they required?
3. Whose duty is it to probate a will? In case of failure to present a will for probate, who may take action? Who cannot move to probate a will? May an executor refuse to serve?
4. In your state, is the will read after the funeral? If not, how do those interested obtain a knowledge of the contents?
5. When should probate be sought? What should an application for probate show? Generally, who should be present at a probate? How is the attendance of these secured in your state?
6. What is a citation? Who are specifically cited? How are citations served in your state?
7. If the will is not contested, who are examined? To what do the witnesses testify?
8. How is a lost will proved?
9. If the lawyer who drew the will had a carbon copy, would that help? If there was no copy existing, but the lawyer and his stenographer could swear to the substance, could the will stand? How can a testator destroy a will and leave a record of his action?
10. If the will is admitted to probate, what is done next? What is the authorization of an executor called?

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CHAPTER VI

CONTESTING A WILL

§ 43. Difficulty of Breaking a Will

When those who would have inherited property find that a duly executed will has left the property to others less deserving, or to strangers to the blood, or to charities and educational institutions, they wax indignant, confer wrathfully, interview counsel learned in the law, and demand that the will be broken. Such suits are always interesting to lawyers, and even without much of a case a compromise is often effected that yields good fees for a minimum of effort. Practically, to set aside a duly executed will is usually a long and costly proceeding, and is successful in only a comparatively few cases. Robert Grant, who was a probate judge in Boston for many years, in "Law and the Family" says:

> It is a current belief, which derives color from the sensational contests of which we read in the newspapers, that a great many wills are broken. But, though the attacks of disappointed or greedy relatives are numerous, the contrary is true according to the records of the largest county of the state with which I am most familiar (Massachusetts) and where predatory tendencies against testators are well developed. These records show a steady average of rather less than one per cent of wills disallowed during the last ten years, a result which is made more remarkable by the reminder that some of these were set aside because of defective attestation instead of the mental incapacity and undue influence ordinarily urged by the rapacious. The statistics for the same period show a yearly average of less than one per cent of wills compromised—that is where the legatees and next of kin agreed to split their differences with the sanction

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of the court. These figures, which are undoubtedly indicative of conditions elsewhere, reveal a disposition on the part of juries to uphold the validity of legal testaments and tend to contradict the notion of the man in the street that his last wishes are apt to be disregarded.

It is to be remembered in this connection, however, that in many cases defective wills and wills by people of unsound mind are allowed to stand because of the great expense of contesting a will. A will involving a large amount offers some temptation to contestants and to their counsel. A will on which no one could make much by setting it aside is not likely to be attacked.

> We all get the idea that it is an easy and a simple matter to "break a will." I did, until after a study of the records. The truth is that it is harder to break a will than it is to break any other human contract. In the entire history of the state of Illinois fewer than ten wills have been "broken" by the Supreme Court.[1]

Note:

1. Unless a testator was clearly not sane, unless his will is unjust, and unless the amounts involved are large, it is not wise to contest probate.

§ 44. Grounds for Contest

A will contest turns on the question as to whether the instrument offered for probate is the will of the deceased person. If the will is apparently complete, in due form, signed by the testator and attested as required by law, it will as a matter of due course be admitted to probate unless someone shows ground for its rejection.

It may be contested by any party interested by showing any of the following reasons why it should not be admitted to probate:

[1] "Have You Made Your Will?" Halsey, *American Magazine*, May, 1916.

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1. That the deceased had not mental capacity to make a will.
2. That he was not sane at the time he executed the alleged will.
3. That he was unduly influenced by those about him at the time.
4. That his execution of the alleged will was procured by fraud.
5. That the will is a forgery.
6. That it was not legally executed.
7. That the court has no jurisdiction.

In any of the foregoing cases, the person who contests the will must prove his assertion positively and so as to convince the probate judge. These causes for contest will be examined more particularly in the following sections. The legal learning on this subject is very extensive and only a few of the more prominent features under each head can be mentioned here.

§ 45. Mental Weakness

If such mental weakness could be shown as to make it clear that the testator did not understand what he was doing, the alleged will would be set aside. A man may be of limited mental capacity and yet know enough and have sufficiently clear ideas to dispose of his property. If a man was under guardianship, that would of course show his mental incapacity to manage his own affairs. But if he has had the care of his own property all his life, he probably will be allowed to dispose of it by will.

A frequent case is where the will is made on a deathbed at the importunity of relatives, and in such cases it is difficult to ascertain just how much mental capacity really existed. Each case depends largely on circumstances, and it is not easy to lay down any rule that would be useful to a layman. It

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cannot be too much emphasized that a will should be made when the testator is well and able to think clearly. To postpone the making of a will until body and mind are failing is to risk the making of a hasty, foolish, and probably unjust will.

Even when the instrument is not set aside, deathbed wills cause endless troubles in the courts. Few such are ever made that accurately or completely describe the property bequeathed. The giving of wrong addresses, wrong description of lands, and failure to describe the kinds of stocks, bonds, etc., bequeathed, cause confusion and much trouble.

§ 46. Insanity

An insane person cannot make a will while insane, but may make a good will in a lucid interval. This whole subject is difficult, and when the question of the sanity of a testator is to be tried, experts are employed on both sides and a layman's opinion is of little weight. Anything that could be said here would be more likely to mislead than to make plain. The quotation that follows is from one of the best modern texts.

> That the task of classifying the different forms of insanity is a formidable one appears in the greatly differing results which the best of medical experts thus far afford. Tests of causation, symptom and order of development, all of which have their undoubted uses in the study of mental disease, are not infrequently confounded in the most arbitrary manner. But no hypothesis, according to sound modern authority, can be constructed which will meet with exactness every possible case of mental unsoundness that may come before the courts.[3]

The many forms of mental infirmity that beset mankind require the scientific study of the expert. Merely the enumera-

[3] Schouler, Wills, Executors and Administrators, Vol. I, p. 117.

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tion of these diseases of the mind makes a frightful list that includes delirium, drunkenness, dementia, monomania, insane delusions, paranoia, and so on, to yet remoter classifications of the mind diseased.

It may be said that if a will made by a person alleged to have been insane is sensible, just, and discreet in its provisions, so that it seems to be a rational expression of the testator's will, the instrument will probably be upheld and adjudged good. If, on the contrary, such a will shows eccentricity, irrationality, and abnormal likes and dislikes, the presumption will be against it.

§ 47. Causes of Rejection

If a will presented for probate has been executed by reason of fraud, compulsion, or undue influence, it may be rejected. To secure its rejection the fraud, compulsion, or undue influence must be proved. The usual form in which undue influence is exercised is when a person of some means, in his last illness comes under the control of covetous relatives or other persons who, when his mind and body have weakened, influence the victim to make such disposition of his property as they desire. There is difficulty in deciding what measure of influence is "undue," because anyone may be influenced by perfectly fair means and when in possession of all his faculties. Many repulsive cases have occurred where those about a dying man have kept other friends and relatives away, and by entreaty and argument have procured from the sorely beset invalid the execution of a will that would not have been made had the testator been a free agent. In such cases it is sometimes hard to secure evidence sufficient to satisfy a court of the wrong that has been done.

Lawyers, ministers, and close friends sometimes take an unfair advantage through their confidential relations with the testator. On the other hand, it is entirely proper for

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those who have the confidence of those likely to die, to advise and counsel them as to the proper disposition of their property.

In the matter of undue influence the character of the will and the disposition made of the property have great weight. Just, fair, and rational provisions for those near and dear to the testator would tend to refute any story of undue influence. If on the contrary the provisions of the will were unjust, unfair, and showed undue partiality to those whose influence was suspected, this would weigh heavily against the will. Many such cases where a will is contested for undue influence fail for lack of proof. Laymen rarely understand that, to get the decision of a court, matters alleged must be proved, and something of which the contestant is morally sure may be impossible of actual proof by positive evidence. Actual force or coercion by fear is not often alleged. If proved, either would defeat the probate.

Note:

1. Before beginning any suit to contest a will, marshal all the admissible evidence and judge whether you can prove your case.

Fraud or Forgery. If the genuine signature of the testator were procured by representing the instrument to be something else, or if a different will were substituted for one he had read or had heard read, or if his signature were forged, it would usually be required that the witnesses should be parties to the crime. On this account it is a venture difficult to carry through successfully and is not often attempted. Legal records yield some strange stories of such crimes, but practically they are so rare that a work like this can ignore them.

Deficient Execution. This matter has already been mentioned. The man who executes his own will is likely to come to grief here. An instrument purporting to transfer prop-

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erty after the death of the party executing it, is not a will unless it is signed, sealed, and witnessed as the law says a will should be signed, sealed, and witnessed. It is the law that carries a man's will into effect, and it prescribes that if any man wishes to get the benefit of the law he must make a will and observe certain formalities when he executes this.

In New York and some other states the statutes prescribe that the testator shall sign at the end of the will. The provision is a wise one and is intended to secure the instrument from interpolation and subsequent additions, but it has happened more than once that a person has bought a printed blank having a place on the third page for signature and attestation by witnesses. The would-be testator, not being able to get all his wishes written before the place for signature, has written part of the will on the fourth page and has then signed on the third page in the place indicated by the form. The New York courts have invariably refused probate to instruments signed in this way.[8]

If a man disregards the prescribed formalities, he may have expressed his wishes but he has not made a will, and the instrument he leaves has no legal or binding force. It is not a will—a court of probate will not recognize it—it is only a "scrap of paper."

Note:

1. If a man intends a will, he must follow the law.

Lack of Jurisdiction. It is possible to contest the probate of a will if it is offered in a court that does not properly have jurisdiction. Such a proceeding would hinder the operation of the will but would not have any influence on the final result. The parties seeking probate might be compelled to apply in another court, but their mistake in going first to a wrong court would have no effect except the short delay.

[8] Matter of O'Neil, 91 N. Y. 516; Matter of Whitney, 153 N. Y. 259; Matter of Field, 204 N. Y. 448.

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§ 48. How Contest of Will Is Initiated

A party in interest seeking to contest the probate of a last will and testament must first file a written appearance with the clerk of the court, together with a written and verified answer to the petition of the party who asks that the will be admitted to probate. This answer should give good reasons why the will should be refused probate, or any facts that can be alleged tending to establish a want of jurisdiction of the court to grant such probate.

In case the jurisdiction of the court should be denied, or the right of any objecting party to appear and contest the probate should be questioned, the court will first hear and pass upon the question of jurisdiction, or the status of the contestant, unless for the convenience of the parties or of the court it shall be ordered otherwise. A stranger, who had no interest in the matter, could not come in and contest the probate of a will.

A contestant may ask for the examination of all the subscribing witnesses to a will, or for any other material witnesses, by filing notice with an affidavit showing the materiality of the testimony of the witnesses or witness sought to be examined, and in such case the attendance of the witnesses or witness may be secured by the usual process of court.

It is the duty of the party presenting the will to establish the will *prima facie,* proving its due execution and the mental capacity of the testator. It then becomes the legal presumption that the testator was of sound mind, and the burden of proof that he was not so rests on the party who alleges that the testator at the time the will was executed was otherwise than sane.

This is the general procedure in courts of probate, but in each state this procedure may be varied, and in fact each probate judge has the right to allow great latitude in these matters. As is the case in all legal procedures, those inter-

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ested must be notified of every important hearing. Each side must be heard and must have the privilege of hearing all that is presented by the other side. When a question of fact is to be decided, usually a jury may be had by either party. The right of appeal to a higher court always exists.

Note:

1. Do not start to contest a will unless you can afford to retain an able trial lawyer.

§ 49. Who May Contest a Probate

Any person who is named as a devisee or legatee in the will propounded, or as an executor, trustee, devisee, or legatee, in any other paper purporting to be a will of the decedent, or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election, may support or oppose the application for probate.

When it appears that all the necessary parties contemplated by this action have been cited or served with notice of hearing of the objections, or have voluntarily appeared in the proceeding, a day is set for the hearing and the formal trial takes place according to the usual procedure of courts.

Note:

1. Consider well whether your interest in a will contest justifies participation in the suit.

§ 50. Who May Defend

The rules for deciding who may defend a will are as inclusive as the rules for permitting parties to contest. Each party in interest may appear and fight for or against the will; that is, each party may employ counsel or may help pay some of the counsel already in the case. A will contest necessarily means large fees for the lawyers concerned, and a protracted case where large interests are involved, many heirs

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and legatees are interested, and high priced experts are employed, may mean that the contested estate will be eaten up by legal fees and expenses and the contestants gain nothing.

§ 51. Compromising

If a will contest can be closed by a satisfactory compromise, that is, so that everyone interested in the will has his rightful dues, it is far better to do so than to carry on an expensive contest. If those who have property to leave object to the free-for-all scramble so often characteristic of will contests, they can avoid it by making reasonable wills or by making final disposition of their property before they become feeble in mind or body.

Review Questions

1. Why is it difficult to break a will? What makes such litigation costly?
2. What are the usual grounds for contesting a will?
3. How much mental capacity is required to make a will? If a will seemed arbitrary and unnatural, would that fact affect the judgment of the court where a will is contested on the ground that the testator was incapable?
4. What is meant by a "lucid interval"? Why is it difficult to define such insanity as would disqualify a person from making a will? In a doubtful case, in what way would the character of the will affect the decision?
5. What is undue influence as distinguished from proper influence? What effect would the character of the will have on the suspicion of undue influence?
6. Under what circumstances might a will be secured by fraud? Why are fraud and forgery in connection with wills of rare occurrence?
7. Is it just that a man's will should be refused probate because he did not sign till after the witnesses had signed, or because the witnesses signed the next day, or because he acknowledged

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it before a notary instead of having it witnessed, or because he had only one witness?

8. In what court in your state should a man's will be probated?
9. How is a will contest commenced? Is the evidence of the witnesses to the will important?
10. Who may contest the probate of a will? Who may defend it? What is the question at issue in such cases? What is the burden of proof? Who has the burden of proof in a will case?
11. How may will contests be avoided?

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CHAPTER VII

VOLUNTARY TRUSTS

§ 52. Property in Trust

Property, real or personal, may be placed in the possession of anyone in trust for any lawful purposes. If Victory bonds to the amount of $20,000 were placed in the possession of Warren Meade by Harvey K. Hastings, "in trust to hold and to pay over the income in quarterly payments to the legal guardian of my child Ellen Hastings during her minority," a trust would be created, i.e., the arrangement would be a trust or a trust estate. Warren Meade would be trustee and he would as trustee have the legal title to the bonds. Ellen Hastings would be the beneficiary, or in legal parlance the *cestui que trust.*

The instrument by which such a trust of personal property was created would be called a "declaration of trust." If it conveyed real estate it would be a "deed of trust." A trust in either real or personal property may also be created by will. In such case, however, it would not be called a "voluntary trust," but a "testamentary trust." The property so held in trust is called a "trust estate." The object of creating a trust estate is usually to provide for someone dependent on the person who creates the trust. If Ellen Hastings were the infant child of the creator of the trust, she would receive the benefit of the income of the Victory bonds until she came of age. It is surer than a will because it comes into existence at once, and a subsequent loss of fortune or of mind by her father would not affect her small but sure maintenance from the trust estate.

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The illustration given is couched in the simplest terms. Many variations and extensions of the principle are possible. Some of these will be indicated in the further sections of this chapter. The trustee may be a single person, or a financial corporation such as a trust company, or a bank; or two or three individuals might be grouped. The better plan in most cases would be to make over the trust property to a bank or a trust company. In every respect such an institution can fulfil a trust for private purposes more effectively than can any individual or group of individuals. Where the trust is for large charitable or educational purposes, a board of trustees may advantageously be organized, such as the Russell Sage Foundation and the similar organizations by Carnegie, Rockefeller, and others.

A trust created by a person for private ends is loosely termed a "voluntary trust," because he goes into it of his own free will, without any consideration, and not because he has agreed to or is compelled to. Because there is no consideration moving to the creator of the trust, and because it is purely voluntary, he cannot be compelled to carry out any promise to make a trust. As with a gift, however, once made the action cannot be recalled, unless a power of revocation accompanied the declaration of the trust.

The annual fee paid trustees in New York for collecting and paying over incomes is 5 per cent on the first $1,000 and 2½ per cent on the next $10,000, and 1 per cent on each additional $1,000.

The subject of trusts is of considerable importance in law and is treated more fully in Part IV of this work.

§ 53. Title to Trust Property

Whoever creates a trust must have the legal title to the property. This legal title is transferred to the trustee or trustees, and is so held for the term of the trust. The trustee

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holds the legal title, and the beneficiary or beneficiaries hold the beneficial interest or equitable title. If any dispute arises as to the trust the beneficiaries cannot go into a court of law because they do not hold the legal title, but have to resort to a court of equity.[1]

It is said that the trustee holds the legal title and the beneficiary or *cestui que trust* holds the equitable title. In law this relates to the court where suit must be brought in case of difficulty. The trust property, if real estate, is charged by the deed of trust with the interest of the beneficiary when the deed is recorded, and anyone who buys it buys it with notice of the trust attached and can be compelled to pay over the income to the beneficiary. If instead the trust estate were bonds, stock, or other personal property, the trust would not attach to the property, and if an irresponsible trustee who had given no bond sold it, the beneficiary could not follow the property, or compel the purchaser to pay him the income.

This means that the trustees should themselves be responsible financially or should be under bond to fulfil the conditions of their trust.

Note:

1. It is usually most satisfactory to have a bank or a trust company act as trustee.

§ 54. The Trustee's Duty

The duties of a trustee are very clearly laid down in the law. His first duty is to preserve safely the principal of the estate committed to his charge. The general rule is that trust funds are not in any case to be mingled with any other funds or assets of the trustee. If deposited in a bank they should be in a special deposit and the name of the account should indicate that it is a trust fund.

[1] For an explanation of the very technical distinction between "law" and "equity," see Woodruff, Introduction to the Study of Law, pp. 46-52, or Conyngton, Business Law, Chapter IV.

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The rule of safety is applied to all investments of trust funds. In many states such investments are regulated by statute. In New York trustees are limited to the same investments as savings banks, viz.: securities of the United States, of New York, of any state that has not defaulted for ten years, or any city, county, town, village, or school district of New York, and first mortgages on real estate, not exceeding 60 per cent of a conservative appraisal of the property. Trustees in New York may also invest in bonds of railroads that have paid dividends on their preferred stock for a consecutive number of years.

Where there are no statutes regulating the matter of trustees' investments the rules of the common law as laid down by the courts would prevail, and generally, trustees, to be safe, should limit their investments to government and state securities or bonds and mortgages on unencumbered real estate to an amount not in excess of 60 per cent of its appraised value.

Since such investments as the law prescribes earn but a limited income, it is customary, where the creator of the trust has confidence in the business judgment of the trustee, specifically to authorize investments in other classes of securities at the trustee's discretion. Such a discretion might be given in these words: "And said trustee is authorized and directed at his discretion to invest and reinvest the funds of said trust estate in good, sound dividend-paying securities." In such case the trustees could invest in any good stocks or bonds, without incurring personal liability if any loss resulted. It should be remembered that it is the duty of a trustee to keep the funds invested so that income may accrue, and if he allows funds to remain idle he may be responsible for interest.

A trustee is governed by the provisions of the will or the declaration of trust under which he acts. If this directs that the property or securities of which the estate consists when

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the trust begins shall or may be retained, the trustee will not be liable for any consequent loss. If there is no such provision, the trustee should make sure that all securities held are of the classes prescribed for trustees, and if not, should sell them and reinvest in legal securities without delay.

Note:

1. A trustee cannot afford to take any risks. He can make nothing by holding uncertain investments. He may lose a great deal.

§ 55. The Beneficiary's Rights

The beneficiary is entitled to have the trust in his favor carried into effect according to the terms of the declaration of trust or the provisions of the will if the trust was created by will. If this is not done, he may in most cases bring suit in a court of equity for such relief as may be necessary. If the trust was a testamentary trust, that is, one created by will, he may apply to the probate court for his remedy.

For any wrongdoing or incompetency on the part of the trustee, the beneficiary may ask his removal and the appointment of another trustee. Trustees have been removed for misuse of funds, improvidence, insolvency, and improper investments. If there were several trustees who could not agree and whose dissensions imperiled the trust, this might be a reason for the court to interfere. In this phase of the law the courts usually show much good sense in their action.

The practical difficulty in such cases is that such a suit is both costly and difficult. The object of putting property in trust is to provide for someone who is unskilled in business. In such case a suit in equity is generally an impossible remedy.

Note:

1. In making a trust be sure that the trustee is permanently reliable.

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§ 56. The Object of Creating a Voluntary Trust

A man may wish to provide a permanent income for his wife and children so that if he dies or becomes bankrupt or otherwise incapacitated they shall not suffer want. In such case, if he can afford to place in the hands of trustees enough property to yield an income that will make them safe whatever happens, he will create a trust that will insure their future. A trust of this kind, made when a man is solvent, will be safe from any changes of fortune that may come to him. Later he might become bankrupt, but his creditors could not touch his trust estate. If a trust were created when a man was in failing circumstances, it would be set aside as in fraud of his creditors.

Another case occurs when a child or other relative is crippled or an invalid, and it is desired to make a provision for an income that shall last for life.

A man retiring from active business may desire to make such an arrangement for his own benefit during his remaining days. In some states, if he got in debt afterward, his creditors could take by judgment only 10 per cent of the annual income from the trust fund. This is also the rule when any beneficiary of a trust fund has a judgment against him, unless the terms of the trust are so worded as to shut out creditors entirely.[2]

In all of these suppositional cases, the body of the estate remains intact until the purposes of the trust have been accomplished, after which time, according to the declaration or the will, the trustee is directed to assign or convey the said property to the children of the testator or their issue, or to such charitable, educational, or other purpose as shall be specified.

If it is not desired to keep the body of the trust estate intact, the end in view can be attained by the purchase of

[2] N. Y. Code Civ. Proc. § 1391.

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annuities in favor of the beneficiaries; but that would leave nothing for those who come after.

In some cases property may be left to an individual or a corporation, conditioned that he or it pay annually a certain amount to a beneficiary for the life of the beneficiary. Money could in this way be given to a charity conditioned that during the life of the beneficiary, he should be paid an income, and on his death the charity would take or keep the principal. Under some circumstances this would be an effective substitute for a trust estate. It would be a charge of record on real estate so left. If it were personal property and the individual were responsible or were compelled to give bond, it would be safe.

Note:

1. A trust should be created only where there are positive advantages to be gained from it.

§ 57. The Declaration of Trusts

A trust estate may be created by anyone who owns property of any kind and who is competent to contract. A transfer in trust is a contract, the parties being the grantor, who assigns or conveys the property, and the trustee or trustees, who take the property subject to the trust provisions. The nominal consideration is usually one dollar, but the fulfilment of the trust provisions is the real consideration to support the contract. No other consideration is necessary to create a trust. If the trust concerned personal property it would be a simple declaration of trust; if it included any real property it would have to be a deed of trust conforming to the local law for the conveyance of real estate. To prepare any trust instrument requires the aid of skilled counsel.

A form in simplest shape to show the construction of such an instrument is given in Part VII, Form 7. Usually, a declaration of trust is a much more extended instrument.

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§ 58. Transfer of Income on Contingency

The usual object of a trust estate is to provide a safe income for some person or persons. Practically all of the states hold that a trust with a definite beneficiary can be made for a life or lives in being if the beneficiary is an individual or individuals. If the beneficiary is a public trust or charity it may continue for any number of years. It would be necessary, though, to investigate the law in each state. For example, in New York the ownership of personal property cannot be suspended for longer than two lives, but the alienation of real property may be suspended for two lives and a minority.

A deed or declaration creating a trust may provide for the transfer of the income, or a change of beneficiary, upon the happening of some event or in case of a certain contingency. For instance it could be provided that a certain income should "be paid my son, Edwin Gray, until he shall have completed his collegiate and professional training and for five years thereafter." Or if it were desired to discourage hasty and reckless adventures in matrimony, an income could be given to a daughter "until she marry." It is not uncommon in wills to provide an income for a man's wife so long as she shall be his widow. It is sometimes provided that the entire income of an estate shall go to the widow until such time as the youngest child comes of age.

In all the cases given, it may be provided that when the contingency happens the income shall be paid to another beneficiary, provided the time limit against perpetuities is not exceeded.

§ 59. Termination of Trust Estate

The payment of income may be limited by some contingency, as has been set forth in the preceding section. When this contingency occurs, the income may be transferred or the

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trust may be terminated by a provision directing that the principal be then paid over or transferred to some individual or institution. For example:

> The net income from said trust estate shall be paid over to my wife, Annie Sherlock, in quarterly payments so long as she shall live, and at her death shall be equally divided among my children and their heirs, per stirpes.

Or as follows:

> The income from said trust or so much thereof as may be necessary shall be paid over to the guardian of my only daughter, Clara Louise Hardy, to pay for her nurture and education during her minority and any excess shall be invested so as to increase the principal. When my said daughter shall reach the age of twenty-one years, the principal to the amount of Forty Thousand Dollars value at that time shall be transferred and made over to her, and any and all above that amount shall be transferred to the Treasurer of Mount Holyoke College, where her mother was educated, for its general fund.

A simple termination is to provide that when the payment of income ceases by the happening of the specified contingency, the residue of said trust estate shall be turned into cash and distributed as provided by law for the estates of intestates.

Review Questions

1. What is a trust in legal parlance? What are the three parties to a trust? How may a trust be created? Why is a private trust called a "voluntary trust"?
2. What is the distinction between the legal title and the equitable title? Why does the equity of the beneficiary attach to real property and not to personal property? Why should trustees be personally responsible?
3. What are the general duties of a trustee? How should he care

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for funds? What investments may a trustee make? How may a trustee be given greater latitude in making investments?

4. Can a beneficiary bring suit if the trustee does not carry out the provisions of the declaration of trust? Where would he bring suit? For what cause may a trustee be removed? Why is a suit in equity usually an impossible remedy?
5. What is the usual reason for creating a trust estate? In what other ways can the object sought in creating a trust estate be secured?
6. Is it necessary to employ a lawyer to draw a trust instrument?
7. How long can a trust estate endure? When the beneficiary dies, what happens to the income? Can a trust income be made to terminate on any contingency other than death?
8. How does a trust estate usually terminate? Suppose the income of a trust estate were payable to a man's widow, no provision being made for the termination of the estate, and she died, who would take the legal title?

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PART II

THE SETTLEMENT OF ESTATES

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CHAPTER VIII

APPOINTMENT OF EXECUTOR [1]

§ 60. The Executor's Authority

The executor derives his authority to act in settling an estate, first from the will and then from the court of probate, which, if there is no legal reason for refusing to recognize his appointment by the will, issues the letters testamentary that evidence the executor's authority.

The appointment of an executor should be provided for by the will. A will might make no disposition of property and do nothing more than name an executor, who would then follow the statutory rules for distribution in settling the estate. If a will named no one as executor, the court before which it was proved would appoint an administrator with the will annexed to carry out the provisions of the will and would issue to him letters of administration.

The will may limit the authority of the executor by specifications as to his procedure, or it may broadly extend it. Not infrequently, executors are made trustees as well, and trusts so created may last for years.

If the testator names a suitable executor or executors the court will recognize the appointment and issue letters testamentary as a matter of course. This is the usual procedure, but creditors and legatees have rights in the estate, and it is the duty of the court to protect them, and if the testator's selection of an executor was unsuitable or had become unsuitable at the time the will was probated, the court would refuse

[1] Chapter V in Part I, "Probating a Will," should logically be re-read as the first chapter of this part.

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to issue letters and would instead appoint an administrator with the will annexed.

§ 61. Necessary Qualifications of an Executor

When the testator selects an executor he should choose a resident of the state in which the testator lives, who has integrity, good repute, and business ability, and who is solvent. If he was leaving the bulk of his estate to some one person, that person, if competent, should be named as executor. It is sometimes a good plan to name the residuary legatee and a bank or a trust company as co-executors. In such case, it could be provided that no important action should be taken without the concurrence of both executors. There are strong reasons for naming a bank or a trust company as sole or co-executor in most cases. This subject is taken up more fully later in this work. (See Part V.)

If the estate is in good shape and the executor is the most important legatee, the court would look less critically to his capabilities. It is only where the rights of legatees and creditors may be affected by the lack of skill, integrity, or competency of the executor, that it becomes the duty of the court to scrutinize carefully the proposed executor's qualifications.

§ 62. Positive Disqualifiations for Executorship

There are certain positive disqualifications, the existence of which would justify a probate court in refusing to issue letters testamentary to the nominee of the testator. It is generally held in this country that the executor appointed should be a citizen of the state so that he may be subject to the jurisdiction of the court of probate. The entire settlement of an estate is subject to the supervision of the court of probate, and it could not exercise this supervision or control the property if it were taken into another state or was in the custody of a citizen of another jurisdiction.

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Generally, creditors and legatees might reasonably object to the estate's being put in charge of an insolvent or irresponsible person, or a man who was feeble bodily or mentally. In such cases, the court's duty is to protect the interests of all concerned. If a minor were named, the court might appoint an administrator to act until the nominee came of age. If the executor named could not or would not give the required bond, the court would not issue him letters. Or if he had a criminal record, was of dissipated habits or of bad repute, the court might well refuse to issue letters. Such cases are of rare occurrence, but when they do occur, the court will instead appoint an administrator with the will annexed.

§ 63. Alternate or Successive Executors

It happens at times that testators name executors without consulting the persons named. The person who is thus named may decline to act, or he may be incompetent to act or dead when the will is probated. In such case, it would save trouble if an alternate executor were named. The difficulty in such a situation is that sometimes it would appear that the alternative was a second choice and was considered the less desirable. In some cases this may be done without such a suspicion. An elder brother may be named, and it may be provided that if he be dead, non-resident, or for any other reason incapacitated for acting, then a younger brother could be called upon.

In this and in any other case where the estate is left without an executor of the will, the court will appoint an administrator with the will annexed who will carry out the provisions of the will and settle the estate in all respects as the duly appointed executor could have done.

It may be desired that a minor son should act, and in such case an executor could be named to act until such time as the minor son should be of age to act himself.

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An executor may not be empowered to name someone else to act in case he cannot act himself or desires to give the position up later. Anyone occupying a position of trust cannot usually delegate his authority to another.

Two or three executors may be named, and it may be provided that one or more of those named may act. In such case the fact that one or more declined to act or were incapacitated to do so would not leave the position vacant. (See next section.)

§ 64. Co-Executors

It is common to name two or three executors to settle an estate. There are several matters that demand careful consideration in such an arrangement. If three executors are named, each has equal authority, and clashes of authority and divided counsels and independent action may cause trouble. It is true that the probate court would exercise its authority to promote harmony, but it would be better if, when there were three, it were provided that any two of them could act, and when there were two, that they should agree on all action. If under such circumstances there was a deadlock, the court could act to decide the disputed point.

One advantage of having two or three executors is that if one or more decline to serve, someone may be left who can act, and if death intervenes before the estate is settled or any trusts are fulfilled, the survivor or survivors can go on without interruption.

The matter of compensation demands consideration in cases of this kind. If the estate is small, the fees for three executors might be entirely inadequate. In New York the statute provides that where the estate is $100,000 or more, each of the executors shall be entitled to full fees, provided the number of executors does not exceed three. Where there are more than three the fees must be divided. In case all of

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the executors named were legatees, the matter of fees would not come up.

The plan of having one individual executor and a financial institution act as co-executor is treated more fully elsewhere. (See § 497.)

§ 65. Acceptance or Refusal

It is possible for anyone to name anyone else as his executor. There is no compulsion on the person named to undertake the task other than friendship for the testator or his legatees. Even a promise made to the testator is not legally binding, being made without consideration. No person should undertake anything of the kind unless he is prepared to do all that may be required to settle the estate. To be executor or one of the executors for a large estate is lucrative and may not be especially troublesome, for large estates are likely to be in good shape and easy to handle. A small estate may, however, be more difficult to settle and the recompense, being based on the values, may be entirely inadequate. It is to be remembered that small claims and small debts and small sales and small legacies are as much, and may be much more, trouble to handle than larger items. Testators should bear this in mind and be careful whom they would saddle with an arduous undertaking.

If the executor named does not intend to assume the task, he should refuse formally and explicitly. In New York in such a case he must file a formal refusal. (See Form 14, "Renunciation.")

In other places, a failure to file bond or to appear or to take any part will be held to be a constructive refusal and the court will appoint an administrator or issue letters to any other executor or executors who may be named.

Acceptance is shown by appearance before the court and participation in the proceedings.

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§ 66. Giving Bond

The testator may provide in his will that the executor named shall not be required to give bond, and in that case, unless there are creditors or legatees who need the protection of the bond, no bond will be required. In the case of a banking institution, no bond is required as there would be no question of its financial responsibility for any failure to administer the affairs of the estate properly. In the case of individual executors, bond is properly required and the bond given should be the bond of a surety company rather than an individual bond.

The bond given should be binding in case the executor fails to file inventory, to administer the estate without delay, to pay all lawful claims and legacies if the assets of the estate are sufficient, and finally to account for all receipts and disbursements.

The amount of the bond is fixed by the court after investigation of the probable amount of the estate to pass through the hands of the executor. This amount could be later increased if there were reason to think that greater security was required.

An executor would not want to give a joint bond by which he would be responsible not only for his personal default but also for any failure on the part of his co-executor. Also he would not want to bind himself to pay all debts and legacies, without a proviso that the net assets of the estate should be sufficient to do this.

§ 67. Granting of Letters Testamentary

In most cases letters testamentary issue as a matter of course after the will has been probated and the prescribed bond has been given. These authorize the executor to take possession of the personal property of the estate and to proceed to administer it. His right is superior to any other so

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far as it relates to personal property or to real property that has been placed in his charge by the will.

Before the issuance of letters testamentary, however, it is the executor's duty to do everything necessary to preserve the estate, but he has no power to dispose of any part of it except in the payment of funeral expenses. He should give notice of the death to any life insurance companies in which the deceased had policies. Ordinarily he takes the initiative in getting the will admitted to probate, but any interested person is equally entitled to do so. Receipts given to debtors of the estate by the executor before the issuance of letters testamentary are valid and release the debtors, but the executor cannot require payment before letters are issued.

Letters testamentary as used in New York are given in Form 12.

Copies of these, authenticated by the clerk of the probate court, are secured and presented to any bank where the testator had an account; to the secretary or the transfer agent of any corporation in which he owned stock; to the custodian of any safety deposit company; and to any other person or institution controlling or having charge of any property of the testator. The executor of necessity must have access to all property and to all papers and all belongings of the testator. If he has reason to believe that any property has been taken away, it is his duty to recover it. His letters are his authorization, and he can bring suit, endorse stock, or do anything else that may be necessary to reduce the estate to his possession.

In many states a foreign executor or administrator may sue as such, his letters testamentary or of administration being recognized by the courts of these states.

The federal or United States courts have jurisdiction to administer, as between courts of different states, the assets of a deceased person.[2]

[2] Lawrence v. Nelson, 143 U. S. 215.

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Review Questions

1. From what two sources does an executor derive his power to act? If a will named no executor, what would the court do? If an executor named in a will had become insolvent and broken in health, would the court appoint him? Who have the right to be protected from an unfit executor?
2. What are the necessary qualifications of an executor? What are the advantages of the appointment of the residuary legatee as executor?
3. What would disqualify an executor? Who are vitally concerned in choosing a capable executor?
4. Is it prudent to name an executor without consulting him? Why is it difficult to name alternate executors?
5. What objection is there to having more than one executor? How may harmony be had? What would happen in case of a deadlock? What are the advantages of having two or more executors? If two or three executors acted, what would be the compensation in your state?
6. Is there any compulsion on a man to act as executor? Why should anyone accept? Why should anyone refuse? If a named executor does not wish to act, how should he decline in your state? How does an executor accept in your state?
7. Why is an executor required to give bond? Why are financial institutions excused? Why is a personal bond not so desirable as the bond of a security company? Who fixes the amount of the bond? If the will asks that the executor shall not be required to give bond, can the court require that he do so? Whom is the bond designed to protect? What does the bond bind the executor to do?
8. When are letters testamentary issued? What authority do they give? How does the executor use these? Would an executor's letters be recognized by a bank, a corporation, or a debtor in another state?

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CHAPTER IX

WHEN AN ADMINISTRATOR IS APPOINTED

§ 68. Appointment of Administrator

The legal distinction between the functions of an executor and those of an administrator is that an executor transfers the estate that comes into his hands to the legatees named in the will, and an administrator apportions the assets as directed by the statutes of distribution.

When a man leaves a will he names his executor. If he leaves no will, or if he leaves a will but fails to name an executor, the court will appoint an administrator to settle the estate. This administrator has all the general powers of an executor to collect claims and to take possession of assets, to sell personal property, and to pay debts. An executor may be given additional powers by the terms of the will, but without any specific directions or extension of his authority an administrator and an executor would have the same authority.

Generally, an administrator will be appointed where there are death and intestacy. There may be a will and the will may name no executor, or the executor named in the will may refuse to serve, and in any such case an administrator will be appointed to carry out the provisions of the will. (See § 86, "Administrator with the Will Annexed.")

§ 69. The Question of Jurisdiction

In case of death, and property being left to be administered, the question of what court of probate has jurisdiction will come up first. To give a court jurisdiction, there must first be the facts of death and residence within the jurisdiction of the court. In cases where a man has not been heard of for

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seven years he is presumed to be dead, while a much less time would permit the presumption of death if he had been in imminent peril of death when last seen or heard of, or if he were on a ship months overdue. The question of the court's jurisdiction would then arise.

The residence of the intestate must have been in the county where letters of administration are sought. Next the fact of intestacy must be shown. An unavailing search must have been made for a will.

The rule laid down by the state of New York as regards the question of what court has the superior or first right to grant letters of administration is as follows, and it may be said that for all practical purposes it is the same everywhere where statutes are in force:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has since his death come into the state, and remains unadministered.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other, or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent, not being a resident of the state, died without the state, leaving property within that county and in another county, and letters of administration have not been applied for in any other county in which he had property.

5. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will or for a grant of letters of administration under (2) or (3) as given above, has not been filed in any surrogate's court;

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but real property of the decedent, to which the will relates, or which is subject to disposition, is situated within that county and no other.

§ 70. Application for Administration

Any person entitled to share in the estate of the intestate may ask to be appointed administrator. If no person so entitled has applied, any person with a claim for funeral expenses, or any creditor of the decedent, may ask to be appointed administrator. The application is made by filing a petition asking administration for the petitioner or for any person or persons who might have a prior right thereto. The petition must state by what right the petitioner asks to be appointed administrator.

It must also set forth the jurisdiction of the court as given in the preceding section. It must give the names of the surviving husband or wife and next of kin. These facts, as to death, jurisdiction, intestacy, and the interest of the petitioner, must be proved by affidavits or otherwise to the satisfaction of the court.

Citations are then issued to the parties who are named as being interested, to show cause why letters of administration should not be issued as prayed for in the petition. In case the petition was by a person who had the prior right to letters of administration, no citation would be issued, as no other person could have any cause for petitioning the court to be appointed administrator. (See Forms 9 and 10.)

§ 71. Who Are Eligible to Appointment

Before any others the surviving husband or wife would have the right to letters of administration. After that would come the next of kin and these in New York rank as follows: First, children, that is, any children of the intestate; secondly, the father of the intestate, and after that the mother of the

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intestate; then brothers and sisters; then uncles and aunts; and, last of all, cousins. If none of these applied, anyone paying general expenses or anyone who was a creditor of the estate could apply for letters.

Who shall be appointed is determined in each state by the local statutes, most of which follow the order given in the preceding section, which is the common law rule. The discretion of the court to reject anyone having prior right can be exercised only in case of the proposed party's drunkenness, improvidence, inability to contract, or lack of understanding. In cases of husband or wife, any divorce recognized by the state law would render the parties ineligible. Generally, as between those having equal rights, men are preferred to women, those of the whole blood to those of the half blood, and single women to married women. If anyone renounces his right, the court will pass such right on to those of the same degree of consanguinity, or those immediately next in order of priority. In case all the property has been left to a sole legatee, such legatee would be appointed administrator of the estate coming to himself. In case a minor was entitled to administer an estate, his guardian would be appointed administrator, at least till the minor came of age. In those localities where there is a public administrator, such administrator would come in before any creditors. In New York, in counties where there is no public administrator, any creditor would have a right to the appointment. If there were no creditors or they declined to serve, the county treasurer would administer and settle the estate. In other states any person having the necessary qualifications could be appointed.

§ 72. Administration by a Corporation

Where a suitable person entitled to administer the estate cannot be found or will not accept, or where those interested agree to such action, the court will appoint a trust company

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or a bank authorized to act as administrator. The advantages of this procedure to all concerned are set forth more fully in Part V of this work. It is usually to the advantage of all concerned.

§ 73. Objections to Appointment

Generally the probate judge would not appoint a person who was insolvent, who was indebted to the estate, or who was a partner of the decedent. He would not appoint one who had been convicted of an infamous crime, nor a person incapable of entering into a contract, nor an alien, unless the alien was a resident of the state. He would not appoint a minor, but might appoint the guardian of the minor. Anyone interested in the estate would have the right to come into court and object to the appointment of anyone who was ineligible, or to object on any of the grounds above mentioned. Such objections would have to be supported by affidavits or other evidence that would satisfy the judge.

§ 74. The Public Administrator

As has been stated, the public administrator, where such office exists, would be appointed in preference to any creditor. The other cases where the public administrator acts have already been given in §14.

§ 75. Granting Letters of Administration

The petition having been presented in due form, and evidence of all jurisdictional facts and of other relevant matters having been made to the satisfaction of the judge of probate, he decides, on consideration of all the facts, whom he will appoint. It should be said here that if the judge is not satisfied with the evidence submitted by the parties concerned, a probate court has the right to issue subpoenas to anyone within its jurisdiction and to examine them as to all facts in the

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particular matter before the court. All other parties having a prior right to administration having been duly cited, and no sufficient reason appearing why the court should not issue letters, the court will direct issuance of letters, conditioned usually on the giving of a bond in proper amount to secure the interest of all concerned.

§ 76. Giving Bond

In some cases, an executor may not have to furnish a bond, but an administrator is always required to give bond. The bond is executed to the people of the state and is filed with the surrogate. It should be a joint and several bond of the applicant for letters of administration with two other persons as surety or a company approved by the court as a surety. The bond usually should be for an amount not less than twice the value of the property to be administered, although in New York State it need be only for the amount of the personal estate. It should be conditioned that the administrator will faithfully perform the duties of the office to which he has been appointed, and, to the best of his ability, all such acts as touch upon the administration of the estate. The amount to be fixed as a penalty will be decided by the probate judge after examination of the applicant and upon any other relevant testimony.

§ 77. Issuing Letters of Administration

The form of the letters issued to a general administrator is usually general in terms and varies in different parts of the country. The form used in the probate court of New York County is practically the same as that for letters testamentary, which is shown in Form 12.

§ 78. Settlement Without Administration

Where there are no creditors, the heirs or next of kin, if not minors or otherwise incapacitated to contract, may, by

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private agreement, settle the estate without taking out letters of administration.

> It is competent for all the heirs of a deceased person, if they are of age, to settle and pay all the debts of the estate and divide the property among themselves without the intervention of an administrator, and neither the creditors nor debtors of the estate have a right to complain.[1]

> Where an estate is not in debt, and the heirs at law, being of full age, carry out a settlement upon which they have all agreed, and by which they receive all that they could by virtue of an administration, they are estopped from disturbing it.[2]

Each one who would be entitled to a share under the laws of the state should give a release of his share in form as follows:

> I, the undersigned, being entitled to a certain share in the estate of my father, James Smith, late of Ithaca, New York, do hereby in consideration of (here specify money or property received from the estate), release and relinquish all my right, title, and interest in and to the said estate.
>
> Witness my hand and seal this 2nd day of May, 1921.
>
> (Signed) JOHN SMITH (L. S.)
>
> Attest:
> IRVIN REYNOLDS

If there are registered stocks and bonds which must be transferred on the books of the respective corporations, it will be necessary, as a rule, to take out letters in order to transfer them. Where there are inheritance or transfer taxes to be paid it may be necessary to secure formal administration. If moneys belonging to the deceased were on deposit, they could not be withdrawn except by a duly appointed executor or administrator. If any claims had to be collected by suit, it would

[1] Taylor v. Phillips, 30 Vt. 238.
[2] Needham v. Gillet, 39 Mich. 574.

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be necessary to take out letters in order to sue. For these reasons it is usually necessary to resort to the courts.

Review Questions

1. What is the difference between the functions of an executor and those of an administrator? Where does an administrator look for his authority? When is an administrator appointed? Who appoints an administrator?
2. What facts give a probate court jurisdiction to appoint an administrator? When a person is missing, what is the presumption as to death? What probate court would have jurisdiction?
3. Who may petition for the appointment of an administrator? If no such person applies, who may apply? What should the petition show? Who would be cited? When would no citation be issued?
4. Who are concerned and in what order? What would be ground for rejecting anyone having a prior right? If anyone having prior right renounces, what is done? If a minor were entitled to be appointed, what would be done? When the office of public administrator exists, where would he rank?
5. What are the advantages of administration by a corporation? When will a court appoint a bank or a trust company administrator?
6. What would be proper objections to urge against the appointment of any particular person as administrator? Who would have the right to interpose such objections? How would these objections be proved?
7. In what cases would the public administrator be entitled to act?
8. Who appoints an administrator? How does he determine whom to appoint? How is the fact of appointment shown?
9. What is the usual form of bond? In what amount? Why is a surety company's bond better? What is the usual consideration of an administrator's bond?
10. What are the essential features of letters of administration?
11. Under what circumstances can the heirs settle an estate out of court? What circumstances would make due administration in court essential?

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CHAPTER X

SPECIAL FORMS OF ADMINISTRATION

§ 79. Administrator with the Will Annexed

When it happens, as it sometimes does, that there has been no executor appointed by the will, or that the executor appointed has not been considered by the court capable of performing such duties, or has died or refused appointment, the court will appoint an administrator with the will annexed (*cum testamento annexo*), figuratively, an executor appointed by the court.

Where, however, the will creates certain trusts and appoints trustees, such an administrator is not the proper officer to act if the trustees should die, be removed, or for other reasons fail to take over the duties entrusted to them. Where there are several executors or trustees, all must renounce, or be declared unfit before an administrator with the will annexed can be appointed.

An administrator *cum testamento annexo* has all the functions of an executor to perform, and the letters which he receives from the court are worded to that effect. The examination by the court, however, will be substantially the same as for an ordinary administrator. An administrator of this kind would not be appointed by the court unless the will had been admitted to probate.

Administration of this kind will be granted to those who have the greatest interest in the will, as in the case of a general administrator. For this reason, a residuary legatee under the will will be preferred to next of kin and to any other legatee under the will; and it has been held in many cases that, where

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such residuary legatee dies before obtaining letters of this sort, his personal representative takes precedence in his right to the same extent.

In Missouri and one or two other states the fact that one has been appointed executor will not bar that same person from being later granted letters with the will annexed. For example, A has been appointed under B's will as executor. Through mistake or ignorance, A also signs the will as a witness. Upon B's death, A, realizing the mistake, rejects the position of executor himself, or is rejected by the court, but because he may have an interest in the will as a legatee or a relative the court may appoint him administrator with the will annexed.

Where an administrator with the will annexed has been appointed upon the removal of an executor for some cause, he has power to compel the retiring executor to make a final accounting, so that he may know what is the condition of the estate the management of which he is taking over.

§ 80. Ancillary Administration

Ancillary administration is defined by the Century Dictionary as:

> A local and subordinate administration of such part of the assets of a decedent as are found within a state other than that of his domicile, and which the law of the state where they are found requires to be collected under its authority in order that they may be applied; first, to satisfy the claims of its own citizens, instead of requiring the latter to resort to the jurisdiction of the principal administration to obtain payment; the surplus, after satisfying such claims, to be remitted to the place of principal administration.

From this definition it will be seen that ancillary administration is an administration that is subordinate to the main administration, and which is a matter of convenience and expediency in settling up estates scattered widely over the coun-

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try or where there is property both here and abroad or in various states in this country.

The main or principal administration will always be in the place of the decedent's last domicile, and any other administrations are merely ancillary. It is not, however, necessary that the principal letters of administration be issued first.

The duty of the ancillary representative is to collect the assets in his particular jurisdiction and then to pay off the local debts. Any surplus funds will be dealt with according to the local court which appointed the ancillary, which court will in most cases remit this surplus fund to the court of principal administration.

§ 81. Administrator of Goods Not Already Administered

An administrator *de bonis non* is one appointed to finish the work of the administrator where the previous administrator has died or been forced to give up the position.

There are two aspects of this sort of administration. Where there has been a will but no executor has been appointed by the testator or qualified to the satisfaction of the court, and there is an administrator with the will annexed appointed—in this case should this administrator die or resign before finishing his work, an administrator *de bonis non* with the will annexed will be appointed.

The second case is where there has been no will. The court appoints an administrator and here, should the administrator die or resign before completing administration, an administrator *de bonis non* will be appointed to fill his place.

An administrator of this kind will not be appointed upon the death or resignation of the prior administrator unless it appears that there are debts remaining due, or personal property which has not as yet been administered. It has been held in this connection that an administrator *de bonis non* may be appointed after the lapse of twenty years from the death of the

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prior administrator. But as a usual rule long lapses of time between the death of the administrator and the appointment of an administrator *de bonis non* will raise the presumption that full settlement of the estate has been made.

The preference or choice in appointing an administrator of this sort is the same as for a general administrator.

§ 82. Temporary Administrations

Administration may be limited to a certain length of time or to particular acts, during which period the temporary administrator has all the powers of an ordinary administrator. There are several divisions in this class that will be discussed in the remaining sections of this chapter. They are as follows:

1. Administration during minority (*durante minore aetate*).
2. Administration during absence (*durante absentia*).
3. Administration for the purpose of a suit (*pendente lite*).
4. Administration *ad litem*.
5. Administration *ad colligendum*.

Much weaker proof is sufficient to raise the presumption of the death of an intestate on an application for the appointment of a temporary administrator to collect, than is required for the appointment of a permanent administrator.

In some states such temporary administrations will be known as special administration for special and limited purposes, but they embrace the same divisions as have been given.

§ 83. Administration During Minority (*Durante Minore Aetate*)

This is granted where a person who has been named as sole executor by the will, or who would have the right to administer an intestate estate, is still under age and therefore legally incapable of serving until he or she arrives at the proper

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age. As in the case of an administrator *de bonis non,* where the executor appointed by the will is under age, the temporary representative chosen by the court will be known as an "administrator during minority with the will annexed," while in the case of no will having been left, the office will be simply "administrator during minority."

Where, however, it happens that there is more than one person named as executor in the will, and one is under age, no administrator will be appointed, since the remaining executor can perform his part of the work until the other becomes of age and can assume his share.

If, in the case cited above, both executors had been under age, an administrator during minority with the will annexed would have been appointed, and his office would cease immediately upon one of the executors coming of age, and qualifying for the office.

§ 84. Administration During Absence (*Durante Absentia*)

This is granted where the regular executor or administrator has gone out of the jurisdiction, either on business or pleasure, or is so ill that he cannot perform his duties for a time. As in administration during minority, the moment the executor or administrator returns or becomes well enough to attend to his duties, administration during absence immediately ceases.

§ 85. Administration for the Purpose of a Suit (*Pendente Lite*)

This is granted while a suit is pending in respect to the will, and the administrator is to care for the estate only until the suit is ended.

> No one should be appointed by the court to this trust who stands committed as to the choice of one contestant against the other, nor should the decedent's estate be subjected to the cost and encumbrance of such an administration,

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where a rightful executor or administrator whose appointment is not questioned can discharge the duties of his office.[1]

The authority of such administrator ceases when the suit is settled; as, for example, where the will is contested, the administrator's duty ceases upon the admission of the will to probate.

§ 86. Administrator *ad Litem*

Where the deceased was, or his estate is, a necessary party to a suit, an administrator may be appointed for the purpose of the action, and with no other authority. This is to be distinguished from administration *pendente lite,* which is authorized only when litigation is pending concerning the probate of the will of the deceased.

A special administrator is sometimes appointed for the sole purpose of supplying a necessary party to an action to which the deceased was, or his estate is, a necessary party, and the administrator so appointed is termed an administrator ad litem.[2]

§ 87. Administration *ad Colligendum*

An administration of this sort is granted where the principal executor or administrator has not yet been appointed, and there is property or goods of the decedent's estate which need immediate attention in order that they may not be ruined or mistreated. As soon as the principal executor or administrator has been appointed, the administration *ad colligendum* is at an end.

An administrator *ad colligendum* is the mere agent or officer of the court and may be compelled at any time to give way to an administrator in chief. An administration of this sort will be granted only when there are neither kindred nor creditors.

[1] Schouler, Wills, Executors and Administrators, Vol. II, p. 1134.
[2] In re Nugent, 77 Mich. 500; McKamy v. McNabb, 97 Tenn. 236.

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§ 88. Termination of Temporary Administration

Every special or temporary administrator, when his authority ceases, should remit or pay over to the general administrator or to the proper person whatever funds of the estate he may have, giving an account as to his work, assets, and disbursements, including the legal compensation for his services. If his report is to the satisfaction of the court, he will then be discharged and any responsibility on his part is at an end.

Review Questions

1. When is an administrator with the will annexed appointed? Who will be appointed administrator *cum testamento annexo*?
2. What is an ancillary administrator? What is the object of ancillary administration? In what place will be the principal administration? What does the ancillary administrator do?
3. What is an administrator *de bonis non*? What is the purpose of such administration?
4. What is temporary administration? For what purposes are temporary administrators appointed?
5. What is the object of administration during minority?
6. What is administration during absence?
7. What is the function of an administrator *pendente lite*? What are the rules as to appointing such an administrator?
8. What is administration *ad colligendum*?
9. When do all temporary administrations terminate? What should such an administrator do when his office terminates?

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CHAPTER XI

TAKING POSSESSION OF THE ASSETS

§ 89. The Title to the Assets

"Assets" is defined by the Century Dictionary as "any goods or property or rights of action; property available for the payment of a deceased person's obligations or debts." They may be defined more generally as the sources for the payment of debts.

Assets are distinguished as real or personal:

Real assets are lands and real property, and in a solvent intestate estate these descend to the heir, while in a testate estate they descend to the devisees, and the administrator or the executor has no concern with them. But though the title goes to the heirs such title may be divested and sold by order of the court, if necessary, to pay valid obligations of the estate.

Personal assets, or as it is phrased in the law, "goods, chattels and choses in action," go to the personal representative. He must first see that all debts and obligations of the estate are settled before he distributes any of the personal property to the legatees or distributees who may be entitled to them. If the entire amount of the personal property is not sufficient to pay the debts, he must secure an order from the proper court to sell some or all of the real property to satisfy the creditors. The personal representative has title to the assets superior to anyone else. Neither heirs nor legatees nor creditors have any right to any portion of the estate until it has passed through the hands of the personal representative.

If an unauthorized individual interferes with the assets of a deceased person, or purloins or appropriates anything from

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the estate, it will be the duty of the representative to hold such assets or to recover them if possible. The representative himself cannot do anything with the personal assets of the estate until he has received his appointment from the proper court. Anyone who, without appointment, possesses himself of any part of the estate left by a decedent or interferes with the same in any way, is termed an executor by his own wrong, or in the jargon of the law, an executor *de son tort*. Such a one acquires no rights by his tortious acts and is liable for any damage that results and for any assets that he may have seized.

§ 90. Time When Title Vests in Representative

The personal representative cannot reduce any of the property into his possession until he has qualified. As soon, though, as he has received his letters, his title goes back to the time of death. It is a theory of the law that property must be owned by someone at all times and that there could not be a period when no one had title to it. On this account the title of the personal representative goes back to the time of death. Any meddler with, or purloiner of, any of the assets of the estate can be held liable by the representative as soon as he is qualified, and he may bring suit for conversion or damage to any of the property of the decedent.

§ 91. The Title of the Personal Representative Is Paramount

The right of the personal representative is superior to the right of any other person. He is entitled to possession and can sue for possession or damages. All the property of the estate must pass through his hands as trustee. His duty is to sell the personal assets and to reduce them to cash in order to pay the debts and to settle legacies. Even where there are specific legacies, the title must pass through the hands of the personal representative and he must pass them on, because it might be that these would have to be sold to pay debts, and

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it is the way of the law to have all title pass through the representative and be passed on by him to those who are entitled to final possession.

The executor is limited by the provisions of the will. An administrator is limited by the provisions of the law which, of course, are general and apply to all estates alike.

§ 92. All Personal Property Is to Be Taken Over

After the qualification and the issuance of letters, the personal representative must take into his own possession all of the assets of the estate. He is required in most states to file an inventory, and he is responsible for the payment of proper transfer and inheritance taxes. In New York State, the transfer tax affidavit takes the place of an inventory. For this reason it is necessary that he should inventory and take possession of all assets and act as custodian of them as soon as possible. If there is any property in the possession of others, he should demand it and secure possession of it, or if there has been possession for a certain period granted to the holders by the decedent before his death, as in case of a lease, he should notify the person in possession and secure an acknowledgment of his paramount title.

§ 93. Right of Representative to Search for Assets

If the estate is considerable, it is no small undertaking to ascertain the property belonging to the decedent. It is the duty of the representative to make diligent search in order that nothing be overlooked. When a man dies, those about him, his employees, his servants, and his relatives, often display very little conscience in helping themselves to articles of property that may not be missed. It is difficult to avoid some loss from this source. In England there was sometimes much trouble to get possession of the personal property because the residence was usually in the personal possession of the heir.

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and the executor or administrator had a very limited right of entry and search. In this country it is believed that the court will sustain a personal representative in forcibly breaking into premises, and in opening locks to safes, trunks, etc., if any attempt were made to hinder him in his search. The right of a personal representative is not entirely ascertained in this particular, and it would be expedient in any such case to use courtesy and diplomacy to effect the desired end rather than to proceed forcibly. When there are statutes authorizing such search the procedure is prescribed.

§ 94. Enumeration of Property to Be Taken Over

In some of the states the property to be taken over is enumerated. An enumeration would not be held to be so inclusive, however, as to prevent taking other property not there mentioned. The following are some of the articles which a personal representative may take over:

Any cash in hand or on deposit—bonds, notes, book accounts, debts, and claims of all kinds.

All goods, chattels, and choses in action—furniture, fixtures, and articles of personal use.

All contract rights that do not involve personal services.

All fees, salaries, or commissions due.

Any partnership interest, including good-will.

Dividends declared while decedent was alive or rents accrued while he was alive.

Any leases for years would be personal property.

All property owned by decedent when he died. The property to be taken would not include goods of others or money collected for others or money held in trust by the decedent. If the personal representative owed the estate money, that should be included as an asset.

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Any general life insurance. Any life insurance in the name of a particular beneficiary would not go into the general estate.

Property retains its character as personalty or realty unless the will directs that personal property is to be exchanged or paid for realty, or that real property is to be sold and the consideration received to be dealt with as personal property.

§ 95. All Claims Must Be Collected

The personal representative is expected to use his discretion in collecting all accounts. He must not waste the estate by collecting, or trying to collect, desperate claims. If he can secure a contribution to meet the costs from those who are to benefit by the collection, that would justify his outlay. Otherwise the representative will not be responsible for failure to collect doubtful claims, and indeed he might be held responsible if he did waste the estate doing this. If there were annual crops, the personal representative would have to see to harvesting them, selling them, and adding the results to the estate.

All actions arising from contracts survive and can be sued upon by the representative. Actions for injuries to person or property do not survive at common law, but in this country an action for damage to property does survive. In each state the causes of action for personal injuries that survive are defined by statute. Generally, an accident which caused the decedent's death would be a cause of action that would pass to the personal representative. Generally, however, actions for slander, libel, breach of promise, and similar matters would not survive.

Review Questions

1. What are assets? What are liabilities? Distinguish between personal and real assets. After death, who takes immediate title

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to the personal assets? What dealings may the personal representative have with the real estate? What is an executor *de son tort*? What is his position legally?

2. If anyone damaged property of the estate before an executor or an administrator had been appointed, could the representative sue for it when appointed?
3. If some stranger took possession of a jewel specifically left to the testator's daughter, who could bring suit to recover it, the daughter or the executor? Why does all title have to pass through the executor?
4. What is the duty of the representative in regard to the assets?
5. How is an executor to ascertain the assets belonging to the estate? What rights of search would he have in your state?
6. What kinds of property would a personal representative take over? What would he not take? If the representative owed the decedent, would the debt be an asset? What about life insurance? Rents? Dividends? Loans to decedent? What is the rule as to personal and real property?
7. What is the representative's authority as to suing on important claims? What actions can he sue upon? What actions do not survive?

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CHAPTER XII

CARING FOR ESTATE FUNDS

§ 96. Bank Deposits

The executor or the administrator of an estate usually has no hard and fast rules to go by. He must in every case consult the statutes of his particular state in order to find what restrictions or privileges he has. If the laws do not state his responsibilities fully, he is expected to use common sense and act in all respects as a careful business man would in conducting his own affairs.

A rule which cannot be too much emphasized is that the cash funds of the estate should not be treated as, or even mingled with, the representative's own. The only valid exception to this is in the case of a trust company, which of course banks within itself the funds of estates for which it is acting.

All receipts of cash should be deposited in some bank of recognized standing, and all disbursements made by check. There may be cases in which the estate is of so small an amount that it is not practicable to keep a separate bank account, but no representative should willingly place the estate under him in this category if he can find any way out. The advantages of putting all cash through the bank are well known. Receipts, when in other form than currency, are by this method detailed on the bank's records as well as on those of the depositor. Disbursements furnish their own proof.

> If a cheque bears on its face or back any indication of its purpose, it is the best receipt for money paid that can be secured. If it bears no evidence as to its purpose, but can

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be readily identified with a particular bill or invoice, it still is a better voucher than a receipted bill.[1]

There can be no reason why some of the receipts should be deposited and not all. More than one bank should not be used unless the amount of cash on deposit at a time is so great that it is not considered desirable to risk it with one bank, or where there is other good reason. Most banks will allow such an account to be opened before the issuance of letters but usually will not honor checks until served with the letters testamentary.

In order to avoid personal liability in case of bank failure the fiduciary character of the account must always be indicated by the name in which the account is deposited. This may be accomplished by making the deposit in the name of "Estate of C. D. Harris, Alfred Rich, Trustee," or "James Chapin, Executor." If the deposit is made in his individual name without the designation of his fiduciary character, he is absolutely liable for loss, regardless of any other fact.

If the bank chosen is in good standing and there is no reason why a reasonably prudent man should hesitate to deposit his personal funds in it, the executor will not be charged with a loss through the failure of the bank, unless conditions are such that it is his duty to disburse the money at once. But he will be charged if he makes the deposit under an agreement to let it remain a certain length of time, or if through the exercise of reasonable prudence he might have ascertained the bank's unsoundness.

In short, the liability of the executor for any loss of money depends upon the care he has exercised in the protection of the funds. He must care for the assets of the estate as diligently as he would if they were his own property, or even a little more so. He will be required to make good a loss if he has

[1] Montgomery, Auditing Theory and Practice, Ronald Press Company, 1919.

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been at all guilty of negligence; otherwise he will not be charged with it. If he exercises the "common or ordinary diligence which men of common prudence generally exercise about their own affairs," he will not be charged.

If it is possible under all the circumstances to secure interest on the checking account, that should be done. Interest will almost certainly be allowed by banks when the balances average $1,000 or more and will remain in the bank a month or more. No agreement, however, to allow the funds to remain a definite length of time should be entered into because of the liability which would devolve upon the executor therefrom. Generally, there is no better use for cash on hand than settling current demands upon the estate, although under prudent management such demands are not always paid at once.

§ 97. Investment of Money

It is the duty of a trustee to invest moneys belonging to the trust. He must not let funds be idle. His duty in this respect differs from the duty devolving on an executor. If funds are likely to remain in his hands for any length of time, they should be invested in such manner as will insure reasonable security and a fair interest. A reasonable time is allowed a trustee within which to invest such funds as he has. After such reasonable time, he may be charged with interest; that is, he may be charged with such interest as might have accrued above the rate paid by the bank if the moneys had been invested in good securities. What will be considered a reasonable time, will, in each case, be determined by the facts, although in some states a period of from six to fifteen months is set within which time funds may be held and not invested, while in Virginia and West Virginia the money must be invested within thirty days after collection. Unless the bank was paying a fair rate on the invested balance, it would seem that six months was too long a period to let money lie idle, while it would not be

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profitable to invest money and pay brokerage if the money so invested was likely to be needed in a few months. The local usage should be ascertained. Such investing as he does, however, must be done in accordance with the statutes regulating trust fund investments. In practically every state, the following are considered valid as a trustee's purchase:

1. Public securities. United States bonds, and state, county, and municipal bonds of the state where the trust is created.
2. First mortgages on real property. The property must have clear title, be located in the state where the trust is to be administered, and the amount invested must not exceed 66 2/3 per cent of the appraised value.

In some states (the statutes should, of course, be consulted at all times), selected securities of the following classes will also be considered good investments:

1. Municipal bonds
2. Corporate bonds
3. Corporate stock
4. Second mortgages
5. Securities of other states

Where a trustee has purchased properly authorized stocks and bonds, etc., he cannot be held liable for any depreciation which may take place after such purchase unless he continues to hold falling stocks when a prudent business man would sell them.

§ 98. Disposing of Unauthorized Investments

Practically the first thing for a personal representative to do is to collect the personal property belonging to the estate and, unless otherwise directed by will, to turn it into cash. If,

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in addition to the usual duties of executor, a trust fund is to be established and the executor is to be a trustee, it will be his duty to see that the investments made with the moneys realized are lawful trust fund investments. The testator or creator of a trust may give positive directions that a certain investment or certain classes of investments be retained or made. In such case the trustee may obey orders without incurring responsibility. Otherwise, in connection with the duty of collecting the estate, will also be the duty of selling any investments of the testator or creator of the trust that are not of the character prescribed for trust funds in the particular state. That is to say, by the provisions of the various state statutes, a trustee may invest or hold for trust only those securities which are approved of by the statutes. If therefore it happens that the bonds already owned by the testator do not come under the list of approved securities for the state, the trustee must get rid of them. If, however, some of the bonds are those approved by statute, the trustee may keep those and sell the remainder.

It is to be remembered that the trustee is held to strict accountability because he is a trustee. A man might perhaps have his own funds invested to some extent in some industrial common stock that pays large dividends, but if he dies and leaves his property, including the profitable common stock, to trustees for the benefit of his wife and minor children, it would be the duty of the trustee to sell the profitable common stock forthwith and to invest the proceeds in the safe, interest-yielding securities prescribed by law for trustees.

In Massachusetts, Connecticut, New Jersey, Kentucky, Illinois, New Hampshire, and Delaware, the rule given above apparently does not apply, and in these states it is held that the trustee may continue to hold any investments already made by the creator of the trust regardless of the standard of such bonds.

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Where the beneficiaries of the trust are adults and capable of transacting business, they may authorize or acquiesce in the purchase of securities other than those permitted by the law by the trustee. In such case, the trustee will not be liable for any depreciation or losses which occur. The beneficiary, however, must have acted freely and deliberately and without influence from anyone. If it is otherwise, the acquiescence amounts to nothing, and the trustee is responsible for losses. In any such case the trustee for his own protection should not act without written authority.

§ 99. Authority to Retain or to Change Investments

In many cases, testators and the creators of trustees explicitly relieve the trustee or the trustees from the restrictions as to investments that would otherwise apply. It could be done by a clause in some such form as this:

> And said trustees in investing the said funds shall not be restricted to what are known as "trust estate investments," but may in the exercise of their discretion buy such securities and make such investments as seem to them best.

This would not authorize the trustees to buy oil stocks or invest in any other speculative ventures, but would justify them in buying such stocks and bonds as provident business men buy for their own investments. If they made such investments and the price went down, the trustees would not be held liable, provided they sold before the loss became excessive.

§ 100. General Rules

A trustee should never lend the funds entrusted to him upon personal security only, no matter what the financial standing of the borrower is at the time of the loan.

A trustee must purchase no real estate with the funds in his care, unless given the power to do so by the provisions of

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the instrument of trust. Even where this is authorized by the provisions of the trust, it is always well to have an order from the court permitting this. Where, however, property has been bought in at a foreclosure of a mortgage duly acquired as a trust investment, this property is considered as personal property and is accounted for as personal property.

§ 101. Business Ventures

Where no authority to conduct a business has been granted by the court or by the provisions of the will or declaration of trust, a trustee must close out a business carried on by the testator within a reasonable time, and invest the money.

Furthermore, a trustee must never invest the funds in any business or trade. The law considers this a mere speculation, and as such looks upon it with great disfavor.

A trustee must never profit in any way from dealings with the trust estate. He may not buy at a sale of the trust property; and any purchase made with trust money, in the individual name of the trustee, is voidable at the will of the beneficiary. He is allowed all lawful commissions and a compensation for his services, and that is all the benefit that he may derive from the trust.

Review Questions

1. What is the general rule for a trustee as to the custody of the money or property of others? Why should he not mingle the estate funds with his own? What is he required to do in earning interest on idle funds?
2. What investments may a trustee make? Is there any extension of these rules in your state? If securities properly purchased and held should depreciate, what is the responsibility of the trustee?
3. If property left for a trust fund contains securities not authorized for trust investments in the state, what is the duty of the

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trustee? If the beneficiaries consented, could the trustee retain unauthorized investments?

4. How may trustees be relieved from the restriction to investments yielding low returns?
5. May a trustee loan trust funds? May a trustee buy in real estate sold by him as trustee? Why not?
6. May a trustee carry on a business with trust funds? May he make money for himself incidentally out of his handling of the trust funds? If trust property had to be sold, could the trustee have a friend buy it in?

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CHAPTER XIII

MAKING AN INVENTORY

§ 102. Objects of Taking Inventory

An inventory is "a detailed, descriptive list of articles with the number, quantity and value of each." It is the first step in dealing with the assets that constitute the estate. It is evidence for: (1) the probate court, (2) the personal representative, (3) creditors, and (4) the legatees. It gives the basis for the accounts and furnishes data for the opening entries. As inheritance taxes are now generally levied, an inventory is essential for the purpose of ascertaining their amount.

The executor or the administrator must charge himself with whatever value is shown by the inventory. This charge is not conclusive as against the personal representatives, as it may be over or under the actual value, and on sale of chattels or collection of claims there may be variations from the inventory values. It answers though as a *prima facie* charge to be corrected later if necessary.

In some cases a will may express the wish of the testator, that his executor be excused from filing an inventory. If an estate is undoubtedly solvent and the executor is also a residuary legatee, this might have been allowed before the days of inheritance taxes, but even then if there was any risk to creditors or legatees, the court would insist that an inventory be filed. Where an inheritance tax is to be paid, an inventory cannot be excused. In New York, as a rule, and particularly in the counties around New York City, an inventory is seldom required, the transfer tax affidavit taking its place. In such

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cases, the matter is of much importance and it is treated more fully in Chapter XXXIV, "Inventories."

§ 103. How an Inventory Is Made

Pursuant to the definition, a list is prepared of all personal property. It should give number, quantity, and value. It should be conveniently classified so as to group like articles, as:

Household furniture (by rooms)
Books, pictures, rugs, and works of art
Watches, jewelry, and silverware
Horses, cattle, and other live stock
Stock in trade
Loans and any other chattels
Cash, notes, and bonds
Certificates of stock, etc.

Each item of any considerable value should be listed separately. Articles of small value may be grouped. Where there are many articles of a kind, as books, an average value per volume can be given.

The value should be the market or sale value at the time of death. If any stock or notes or claims are of dubious and uncertain value, that fact should be stated. (See also § 260, as to inclusion of real estate for inheritance taxes.)

§ 104. Appraisement

Appraisers and the formalities of their appointment are commonly prescribed by statute, the usual number being three. After being sworn, these agree on the values affixed to the inventory. The inventory should be signed by both the executor and the appraisers, then verified, and then filed with the clerk of the probate court.

In New York the only appraisals required are for fixing the taxable values for purposes of transfer. No definite num-

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ber of appraisers is prescribed. Usually not more than one is appointed. He, however, may have the assistance of more. The executor usually has appraisals made, which in the transfer tax proceedings are submitted to the state appraiser designated by the surrogate. The transfer tax affidavit is signed only by the executor, not by the appraisers. Supplemental affidavits, appraising certain specific property, are sworn to by whoever appraises them, not by the appraiser designated by the surrogate. Real property is included in these appraisals even though it does not come into possession of the executor.

§ 105. Time for Filing

The inventory and appraisement should be made and filed within three months, though each state prescribes the time by statute. An inventory filed after the specified time would not be invalid on that account. If an executor failed to discover assets within the time set, he would be excused for failure to file inventory, but it would be his duty after receiving assets to file an inventory without unnecessary delay. In New York, however, as stated in § 102, an inventory other than for transfer tax is not required.

An inventory may be waived by all the parties in interest where it is not required for ascertaining the inheritance taxes. It would be unnecessary if no assets came into the hands of the personal representative. In such case it would be necessary for the representative to file an affidavit stating the reason for not filing an inventory. In those cases where all those interested in the estate pay all debts and then distribute the property, no inventory would be required. This would not apply where the inventory was needed for inheritance taxation.

Failure to return an inventory is on its face culpable negligence on the part of the representative, which he may be able to explain. It is a breach of his bond, and if loss were caused to anyone by his omission the representative would be respon-

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sible. If an inventory is not filed the representative must usually show good cause for the failure.

Anyone interested may complain of failure to file an inventory or may ask to have any error or omission corrected or amended, and the judge of probate will compel the representative to file an inventory or to correct any error.

§ 106. How Far Inventory Is Conclusive

An inventory is presumed to be correct, and the burden of proving it otherwise would be on the person objecting. Objection could be made by affidavit to any material error and in such a case the court would make an appropriate order.

As a whole, the inventory is conclusive, and while the valuations may later appear to be over or under the real value, all of this may stand until corrected by the final accounting.

Generally, the correctness of the inventory and of the valuations by the appraisers cannot be attacked until the accounting. When the accounting is made, failure to include all the estate, or failure to value at its worth at the time or any overvaluation may be shown, and such action can be ordered as will meet the situation and correct the error.

Review Questions

1. What is an inventory? What is the object of the inventory taken by an executor or an administrator?
2. How should an inventory be prepared as to classification? As to itemization? The value should be as of what time?
3. What is the law as to appraisement for taxation in your state?
4. Where should an inventory be filed in your state? When may an inventory be waived? Who is responsible for any damage caused by failure to file an inventory? Who can compel filing or the correction of error?
5. Who may object or show incorrectness of inventory? When may errors in valuations be corrected?

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CHAPTER XIV

ASSEMBLING CLAIMS AND PAYING DEBTS

§ 107. Payment of Claims Requires Care

The law will not permit the distribution of a decedent's property to the exclusion of his creditors. The estate assets must first be applied to the payment of all just claims against it. The law of every state prescribes a certain routine through which the executor must go in order to save himself from personal liability to creditors, and the order of priority in which claims are to be paid.

All approved claims against the estate should be paid by the executor in the order prescribed by law, but the order of payment is of importance only in cases where there are not sufficient funds to pay all debts. (See § 111.) In such cases the executor may render himself personally liable if he pays without regard to the prescribed order.

§ 108. Notice to Present Claims

Since there can be no certainty that all debts can be ascertained by the executor from an examination of the books and records of the decedent, public notice must usually be given by the representative to creditors to present any claims they may have against the estate within a certain time. This action is usually taken after the appointment of an executor or an administrator, and after the inventory and appraisement of assets have been made. The time allowed creditors for the filing of claims differs in the various states, but usually runs from six months to two years. If they fail to present their claims within the statutory period, they cannot come in later and dis-

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turb the settlement that has been made. Jessup, in his work on Surrogates' Practice, says:

> It is advisable to do this before the transfer tax proceedings, because of the deduction to which the estate is entitled by reason of such debts, in fixing the net amount of the tax payable.

Where there are claims that will not accrue within the time specified for payment, the statutes of the states usually provide that if such claims come up later they may be enforced, and if the executor or the administrator has been discharged they may be enforced against any heir or legatee of the will who has received assets of the estate. Persons having such deferred claims should, however, present them for allowance and ask that funds be set aside to meet them when due.

§ 109. Method of Presenting Claims

In some states the claims are presented directly to the executor or the administrator, while in others they go immediately to the court conducting the settlement of that particular estate. In most of the states, however, the claims are first presented to the representative, who will either allow the claim and settle it in good time, or reject it. If an executor believes a claim to be invalid, he should reject it. The creditor may bring the matter to the attention of the proper court to decide whether or not the executor or the administrator is right in refusing to allow the claim. In some states it is not the court which appointed the executor that has jurisdiction to order the payment of a rejected claim.

When all claims finally have been collected and passed upon, the representative must usually present a statement to the court containing the aggregate amount of all the claims and the total assets on hand to cover them. If the personal assets are not enough and there is real property, the court will be asked to

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make a decree allowing the representative to sell as much of the real property as need be to pay the excess of debts. If the insufficiency of assets is satisfactorily shown, the court issues an order directing the sale of enough real estate to pay the debts in excess of the value of the personalty. Because of the possibility that the personal assets may not be sufficient to meet the debts, the executor should not pay over any legacies, either general or specific, until he is certain that there will be enough money from the sale of personal property to pay all the debts. If the legacies have to be abated in order to pay some of the debts, the money will be taken from all the general legacies proportionately, so that no one legatee will suffer more than another. (See §129.) Specific legacies will not be subject to the payment of debts until the general legacies have been exhausted. (See §130.) However, as has been mentioned before, if rightful claims should accrue after settlement, they may be collected directly from the heirs or the legatees.

Except where specific statutes have changed it, the usual rule is that the title to the legacy is in the legatee immediately upon the death of the testator, but the legacy itself need not be paid until one year from the testator's death. This gives the executor ample time to assemble all claims and to assure himself that they can be paid without abating legacies, or, if legacies have to be abated, to ascertain the abatement from each one. The executor can be held personally liable for the payment of a debt presented to him within the time allowed by law to creditors for presenting claims, if in the meantime by distribution of assets he has made it impossible to pay the debt out of the estate.

§ 110. Charges upon Estate Prior to Preferred Claims

Claims against an estate are usually styled either "preferred" or "arbitrary," and they are not paid until all assets

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and claims are gathered, and at that time preferred claims are paid off first.

But in practically all of the states, either by statute or otherwise, there are charges which accrue against an estate, and which must be paid off before anything else. These are not called "preferred claims" because they outrank even them, and are to be paid first of all, immediately upon appraisal, before the claims are assembled. Such charges are funeral expenses (including in some states physicians' charges and other expenses of the last illness), and an allowance for the support of the surviving parent and any children, pending settlement of the estate. The last depends entirely upon statute. Sums of money in amounts approved by the law may be paid from any ready money or assets on hand at the time, or may be advanced by the executor, who will later be reimbursed from the first assets acquired from the estate.

In Arkansas, Missouri, Alabama, Georgia, Utah, California and a few other states, the statutes provide that if the assets of any estate fail to reach a certain specified amount such assets shall remain exclusively to the surviving spouse and children, subject only to encumbrances which may have been on the property during the lifetime of the decedent.

This "right of allowance" being a statutory one, a person may not defeat the right of the court to assign such an allowance where necessary, even by putting a clause to that effect in his or her will. This allowance is distinct from the right of dower and in no way cuts off or lessens a wife's right of dower, nor will an antenuptial settlement in lieu of dower bar her right to such an allowance. A bequest may be made to her in lieu of her statutory right of dower. Then she elects to take one or the other. But an *allowance* may also be granted even if the estate is large if it is necessary for the support and maintenance of the surviving parent and children pending settlement of the estate and the granting of dower.

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Where the survivor is the wife and there are no children, the property given to the wife as an allowance is hers absolutely and not just for the period of her life. This rule applies also to a surviving husband where there are no children.

The deceased should not be given a burial out of keeping with his standing in life. Usually there should be no large outlay, because if the estate is not extensive, as much money as possible must be left for the creditors and other expenses of the estate. Some of the states, however, following the English rule, fix the amount that may be spent on a funeral under various circumstances. In Alabama, for example, if the estate is solvent the amount has been fixed as from $200 to $300 and no more, regardless of the former style of living and the supposed wealth of the deceased.

The physician's charge for the last illness should also be attended to as soon as possible, but if the charge is unreasonable, a court may inquire into the matter and may allow only what it considers the correct amount. This will also be done in the case of funeral charges where the undertaker has presented an unreasonable bill.

The three kinds of charges given in the first part of this section—expenses of last illness, cost of burial, and statutory allowances for the family—must be paid first, and these three kinds are considered equal. If, therefore, the assets will not cover the aggregate amount, they must be divided equally among the three items.

§ 111. Preferred Claims

As a general rule, where the estate is large and there are ample assets to cover all debts, priority need not enter into the settlement at all. When the estate is small, the charges before mentioned are paid off first, and then come the general debts, among which there may or may not be preference in payment, as may be prescribed by the statutes of the different

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states. It may be said, however, as a general rule, that where preference is shown at all, it will be given in the following order:

1. Debts due the government and taxes
2. Judgment creditors
3. Specialty debts, i.e., mortgages
4. Simple contract debts

It may be noted here that in some jurisdictions, at the discretion of the court, money due the deceased's landlord for rent due or accruing on a lease or leases in the possession of the deceased during his lifetime may take precedence over the fourth class of preferred claims.

Where the personal representative gives his own money in order to cover a debt for payment of which the deceased has pledged valuable security or collateral, he may either take possession of the collateral or be reimbursed from later funds of the estate.

§ 112. Invalid or Doubtful Claims

Claims based on the oral agreements of the decedent to do some particular thing or to pay for something, and merely alleged by the creditors or claimants, without written proof of any kind, are quite the most frequent and puzzling for the representatives to settle, and require substantial proof on the part of the claimant before they will be accepted as valid.

An executor or an administrator in his individual capacity as a creditor of the estate has the right to present a claim and to have it proved and verified, but he must not satisfy his own debt (this has nothing to do with the administration fees) from the estate that he is settling until his claim has been approved by the proper official of the probate court.

Claims against the estate of the decedent, whether oral or written, which have not been presented during the lifetime of

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the decedent, should be carefully examined by the representative. Claims of this sort, brought forward only when the debtor is dead and unable to explain or refute such debts, should be allowed only upon the best of proof.

The representative whose duty it is to defend the estate against such claims should use to the best advantage any counterclaims against such creditors which there may be, and also plead the Statute of Limitations against others where possible. Debts of the decedent become barred by the Statute of Limitations after a specified period after their maturity, and to continue the debt beyond that time there must be a promise in writing signed by the party to be charged.

§ 113. Failure of Assets.

Debts are to be paid out of the personal estate; when, however, that is insufficient to pay them, an order of court may be secured (see §125) authorizing the sale of real estate in order to obtain sufficient money to pay such *debts as cannot be satisfied* out of the personalty. If enough is finally realized from the sale of personalty to pay all debts and yet real property devised or descended to someone has been sold, the devisee or heir may demand reimbursement from the personalty.

When it happens that one claimant has the right to be paid from two or more funds and another from only one fund, the claims should be so arranged that the one who has access to more than one fund shall be compelled to exhaust the assets of the other funds before the one fund open to the other claimant is levied upon. This process is termed "marshaling assets."

§ 114. Paying Debts Promptly

The personal representative is supposed to pay all claims at the earliest possible time. Such time is not, however, until

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the statutory period within which he may collect debts and recover assets has come to an end. If the representative pays any legacies and debts in full before he has knowledge of the full amount of indebtedness, and the amount of assets, he makes himself responsible, and he may be held for payment by any creditors who are ascertained after such time, where the assets run short. In this last case, the representative will be liable to later creditors for the amount to which they would have been entitled ratably with the other creditors. An executor or an administrator can never be held liable for non-payment of such claims until the close of such statutory period.

Review Questions

1. What must be paid before legacies are satisfied? If an executor immediately gave a legatee a specific legacy of a diamond pin and later the estate proved insolvent, what would happen? In your state how long may an executor postpone the payment of legacies?
2. Within what time must claims against an estate be presented in your state? How are creditors notified? If claims do not mature until after the administration has been closed, can they be collected?
3. To whom should a claim against an estate be presented in your state? If the representative rejects a good claim, what can the claimant do? Suppose the valid claims presented exceed in amount the aggregate of the personal property, what is done? When must a legacy be paid?
4. What charges against an estate are payable first? Why are these paid first? May the statutory allowance be defeated by will? Is the allowance a substitute for dower? How does it differ from dower? How much should be allowed for burial expenses? If there is not enough to pay these three kinds of charges, what is done?
5. As between the claims filed, what, if any, should be the order of payment? Have charges for rent any preference in your state?

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If the representative advances his own money, how may he be reimbursed?

6. How could a claim against an estate founded on an oral contract be proved? Can an executor give any preference to a claim of his own against the estate?
7. Where there is a deficiency of personal assets, debts are to be settled at the expense of what legatees and devisees? If real property has been sold before personal property is exhausted, what recourse has the devisee or heir? What is "marshaling assets"?
8. What is the statutory period within which debts against an estate are to be paid in your state? If the executor pays some debts or some legacies in advance, what risk does he run?

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CHAPTER XV

SELLING PERSONAL PROPERTY

§ 115. The Need for Cash

In nearly every case where an estate is administered, the first need is to secure cash for the following purposes:

1. To pay funeral expenses, last illness allowances, and any taxes that may be due.
2. To pay inheritance taxes.
3. To pay all outstanding debts and claims.
4. To pay the expenses of administration.
5. To pay legacies or to apportion residue among those entitled to it.

In comparatively few cases is there enough cash on hand to avoid a sale of some part of the estate. In the majority of cases the will itself necessitates the sale of some of the property, and where there is no will the personal estate must of necessity be turned into cash for distribution. Hence the personal representative has unrestricted authority to sell personal property for the purpose of securing cash, but before making any such sale the representative should inform himself as to any law, which may require a certain kind of sale or certain notices to interested persons. Where specific legacies of personalty have been made these would not be sold if it were possible to pay all debts from the sale of other personal assets.

§ 116. The Power to Sell

Without any order from court or express authorization in the will, an executor or an administrator has authority to sell

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personal property, and anyone purchasing from him would take a good title. In some states it is usual to obtain an order from the court directing a sale of personal property, and it is sometimes expedient to secure such an order, more particularly so when the property seems likely to sell for less than its appraised value. Where a business or an interest in a business is to be sold at a private sale, it relieves the personal representative of responsibility if the court orders the acceptance of the offer. Other cases may arise where the representative would prefer to have a court order to relieve himself from responsibility. To sell real estate, an order of sale from the probate court is always necessary unless the will contains a power of sale. To sell personal property, the executor or the administrator acting in good faith and with discretion generally needs no order of court.

§ 117. What to Sell First

An executor should use business judgment in regard to what should be sold first. If specific legacies of personalty have been made, these would not be sold unless it were found impossible to pay all debts from the sale of other personal assets.

It would seem that perishable assets should be disposed of before any others. In some states a special order from the court may be obtained to sell assets that will quickly spoil, waste, or depreciate; but generally speaking, an executor or an administrator not only has authority to do this, but would be deemed culpable if he failed to do so.

Cattle, horses, or any other possessions that demand care and charges for their upkeep, should be sold with least delay. Sometimes such property will be taken over on favorable terms by some one beneficiary. Any risky or speculative investments in goods, stocks, or commodities should be closed out as soon as a good price can be had. A man may take risks with his own means in the attempt to increase his capital, but the duty

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of his personal representative is to avoid loss, not to strive for a profit. Hence, unless positively directed otherwise by will, the personal representative should not retain any dubious or speculative investments, but dispose of them to the best advantage and, if their value is to be held, reinvest in safer directions.

It is not expected that the personal representative will go to any considerable expense in repairing, painting, and improving property or premises; but necessary repairs, care, and upkeep to maintain the assets in good condition, should be arranged for.

If, in the executor's judgment, repairs to property will facilitate its sale, the court will allow the executor credit for reasonable expenditures for that purpose. The expense of such repairs is a proper administration expense because it is necessary to the conversion of the property into cash for distribution with the greatest advantage to the estate.

When a beneficiary will take part or all of the personal assets at not less than their appraised value, the representative will usually be justified in dealing with him.

After disposal of such personal property as has been mentioned, an administrator with no will to direct him should arrange to sell the remaining goods and choses in action at some convenient time and place.

§ 118. How to Sell Goods and Chattels

The usual method of selling personal goods and chattels is to have a public sale and dispose of them at auction to the highest bidder. The time of an auction sale should be printed in the bills and advertisements. If the goods are advertised to be sold to the highest bidder, the auctioneer may not bid in himself nor refuse to sell to a bona fide bidder. If the sale is under order of court, the terms specified must be observed. If terms of credit are announced, bidders must not be permitted

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to take goods away until they have complied with these terms, and the representative will be responsible for any losses that ensue through failure to observe them. For instance, if buyers were given six months' time on all amounts in excess of $100 on giving bankable notes for the amount, they should not take any goods away until such notes had been given; but if they gave such notes and later the notes were dishonored, the executor would not be held responsible.

§ 119. Selling Securities

In reducing the assets to cash, good, income-yielding securities should be retained as long as possible, both because they are yielding an income and because they can be sold without loss at any time. But speculative and uncertain stocks and securities should be sold at an early date to the best possible advantage. If they are depreciated in value and are likely to be worth more later, they should be held back from immediate sale; but if there is no likelihood of their being worth more, they should be disposed of, and if any of the beneficiaries want to take them at their appraised value it would be proper to let such have them.

Notes and claims should be collected when due. Such obligations may at times be sold. If secured and not immediately due, it may be best to sell them, at not less than their appraised value.

§ 120. Consultation with Beneficiaries

When the beneficiaries are of age and accustomed to doing business, the personal representative may advantageously consult them as to the sale and disposition of the assets. It may be that the best disposition of personal property can be agreed upon by all interested, in which case a written consent signed by all would relieve the representative of a responsibility that he might not care to assume. It might be that one or more

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of those interested would be willing to take over some part or all of some class or classes of property. If the others would agree and give written consent, the representative could complete the deal.

If the representative himself desired to buy some part of the assets of the estate it would be improper, and he could avoid the suspicion of fraud only by getting the consent of all those vitally interested.

§ 121. Disposing of a Going Business

Sometimes a business is wound up and the stock is sold at auction. Or the stock may be marked down and special sales held until it is depleted; then the remainder is sold at auction. The appraised value of the goods in stock would probably be secured by this procedure, but the good-will would be dissipated. If the business were solvent, the good-will should have a real value. This the personal representative should endeavor to turn into cash.

In appraising the assets, the general rules as to the value of good-will should be followed. (See §157 and cases.) If a business is to be sold, the executor or the administrator should try to realize on the good-will. To do this the business must be sold as a going concern, with good-will, trade-marks, trade-names, trade assets, and lists of names all included. In many lines there are brokers who undertake to sell going businesses for a fair commission. Where this is not the case, the representative must advertise in trade papers, correspond with other dealers in the line, and consult with all who might purchase or know of possible purchasers. Sometimes older employees may be encouraged by easy terms to take over the business. Sometimes one of the beneficiaries may be willing to go on with it.

The executor or the administrator may keep up and carry on the business in order to sell it as a whole. He may not

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carry it on to make money for the estate. His function is not to make but to save, to avoid loss, and to distribute and settle the estate as soon as it can be done.

§ 122. Disposing of a Partnership Interest

An executor or an administrator has no authority in a partnership, or to wind up the affairs of a partnership. That devolves on the surviving partner or partners.

The death of a partner dissolves a partnership immediately, whether it be a partnership at will or a partnership for a fixed term. The mutual agency, characteristic of all partnerships, is at once revoked, and the estate of the deceased partner is not bound by any contract or obligation entered into after his death.

A partnership agreement may provide for the event of a partner's death. (See Chapter XIX, § 160, "Provisions for Death in Articles," and cases.) It is not easy, though, to make an agreement that will hold the estate of a deceased partner liable for more than the amount invested at the time of death.

A partnership agreement for the survivor to take over the business, or giving him the option of purchase at a specified price, is held to be good in New York and Massachusetts, while in Rhode Island and Alabama it has been held otherwise.[1]

If the partnership agreement provides for sale to the other partner or partners, the personal representative has no responsibility other than to see that the agreement is carried out, and that the estate receives the agreed amount for the deceased partner's share.

In cases where there is no such arrangement, the possession of the business and assets will devolve on the surviving partner or partners for the purpose of winding up the partner-

[1] For a fuller discussion of this question see an excellent synopsis of the cases in Lawyers' Reports Annotated (New Series), 1918 B, 905.

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ship. It follows that they will have the power to do all things necessary to accomplish this purpose, and in so doing the personal representative may not interfere, unless it appears that they are misusing their powers. It is their duty to notify those who have been dealing with the firm of the death of the partner and the consequent dissolution of the firm, and of the fact that they are winding up its affairs. It is also their duty to fulfil existing contracts, to dispose of the partnership assets to the best advantage, to pay all debts, and to turn over to the executor or the administrator the proper proportion of the surplus. They are not usually entitled to compensation for their services and they are required to account for good-will.

In all such cases, it will probably be better for the surviving partner or partners to make the representative an offer to buy the interest of the deceased at a fair price and on reasonable terms. If the proposition so made is fair, the representative should accept it, obtaining, if necessary for his protection, the consent of the beneficiaries or an order of court authorizing the sale.

Review Questions

1. Why is it necessary to turn the personal assets into cash? Are specific legacies exempted from sale?
2. In your state, when is it necessary for an administrator to get an order from court to sell personalty?
3. What personal property should be sold first? Should a personal representative endeavor to make profit? What is his duty in regard to risky or speculative holdings? If a legatee will take any of the personal property at not less than its appraised value, should the representative sell to him?
4. What is the usual method of sale of decedent's goods in your state? Is the sale ordered by the court? What are the usual terms?
5. Which securities should be sold first? What should be done with notes and claims?

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6. What advantage is there in consultation with beneficiaries as to the disposal of personal assets? May the representative buy any of the personalty himself?
7. In selling a going business, how may the value of the good-will be saved? How soon should a going business be sold? Should the representative continue the business himself?
8. May a representative wind up a partnership? Why not? What is the effect of the death of a partner on the partnership? If a partnership agreement provided that, on death of a partner, his associates should purchase his share at a price based on the last inventory, what would the representative do? Where surviving partners are winding up a business, what can the representative do? What is the duty of surviving partners in such cases? What is the simplest way to close up the affairs of a partnership?

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CHAPTER XVI

SELLING REAL ESTATE

§ 123. The Usual Course as to Real Estate

In the settlement of an estate, the real estate does not usually figure, unless: (1) there is not enough realized from the personal property to pay the debts, or (2) the will gives the executor power to sell or mortgage real estate.

Except in these two cases neither the executor, the administrator, nor the court of probate, has any more power or authority over the real property of the estate than an outsider.

On the death of the owner, real estate goes at once either to the heirs at law or, if there is a will, to the devisees. The representative is responsible for the payment of the transfer taxes, and he must secure repayment of that part of his advances that is properly a charge on the real estate. (See §139.) Sometimes the heirs or devisees will authorize the representative to collect rents, but in such case he gets his authority from their consent and is responsible to them for what he does and not to the court. In some states the statutes authorize him to collect rents.

§ 124. Paying Debts from Personal Estate

Real estate is to be used for paying debts only where the personal assets are not enough, unless the will has directed the sale of real estate for that purpose. After the representative has advertised and inventoried all the just debts and claims of every kind, it is his duty to pay them from cash on hand or deposit, from such money as he may collect and from the sale of personal effects. It is only when these funds are shown to be

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insufficient that he can secure an order or license from the court of probate to sell, lease, or mortgage the land to secure more money.

§ 125. Selling Real Estate to Pay Debts

The statutes of the state of New York provide that any real property or interest in real property may be mortgaged, leased, or sold for the payment of debts, funeral expenses, or expenses of administration. A debt is defined by the New York Code as "any claim or demand on which a judgment for a sum of money could be recovered in an action." When such procedure is necessary, the representative may apply by petition for an order to mortgage, lease, or sell the real property of the decedent. The petition must set forth facts showing that the personal assets are not sufficient to meet the just demands and claims against the estate, and must give a schedule of the debts and claims as allowed by him against the estate. All those interested in the real estate are cited to appear at the hearing. The debts and claims as filed are taken to be valid unless some one of those interested objects. In case of objection, the merits of the claim or claims criticized are determined by the court. If it appears necessary to raise money to pay debts from the real estate, the court makes an order directing the representative to mortgage, lease, or sell the whole or such part of the real property as the court may have decided upon.

If there are several parcels, the decree must direct sale in the following order:

1. Property that went to the heir by descent and which he has not yet sold.
2. Property so inherited that has been sold. (Any property sold by the heir or the devisee before the estate is settled, is sold with the possibility of having a charge for debts upon it.)

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3. Property devised by will that has not been sold.
4. Property so devised that has been sold.

It is the duty of the executor or the administrator to execute the order of sale, subject to the approval of court, and to report what he has done. The court may then confirm or reject the mortgage, lease, or sale, and may extend the order to other parcels of land or require a re-execution of the order upon other terms and conditions.

In each state it is necessary to follow closely the statutory procedure, as the result of such an order is to divest the heir or the devisee of his title to real property. It is a matter in which it would be well to have the aid of counsel.

It is to be remembered that under no circumstances may an executor or an administrator buy in the property himself. Such a purchase would be void.

It is usual under the statutory proceeding to require the personal representative to give bond for the faithful performance of the duties imposed by the order, and to account for all moneys received by him when required by the court.

§ 126. Selling Real Estate under Will

Not infrequently an executor is empowered or directed to sell some parcels of real property to pay debts or to pay legacies or to create a trust. The exercise of such an instruction may be merely discretionary or it may be mandatory. When real property is sold in this way by an executor, it is legally considered as converted into personalty. As stated in legal phrase, a positive mandate to sell, works a conversion of real estate into personal property and this conversion relates back to the death of the testator. That is, in such case, a court of equity will consider that the executor has converted the real estate in question into personal property, from the date of the testator's death.

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This change from realty to personalty is termed "equitable conversion," and is far reaching in its results and often affects the ownership for years to come. As real estate it passed by the laws of descent. As personal property it follows the statutes of distribution.

It is difficult to divide and apportion parcels of land among a number of heirs, hence it seems simpler for a testator to say:

> I direct and empower my said executor to sell to the best advantage all of the real estate of which I shall die possessed, and to distribute the same equally among my five children, or if any of my children shall not be living at the time of my death, his or her children, if any, shall receive the share of the deceased parent.

If a testator merely gives a direction to sell if necessary, a sale under such circumstances does not have the effect of equitable conversion. The testator can make sure of such effect by:

1. A positive direction that lands shall be sold.
2. Making it necessary to sell lands in order to carry out the intention of the will.
3. Imposing a duty or obligation on the executor to sell in any event.

In all cases of this kind an executor's powers are closely limited by the directions of the will. He can do what it prescribes and no more. It is his power of attorney, whereby he does what the testator gives him power to do.

§ 127. Existing Contracts Relating to Realty

When a testator enters into a contract to buy realty, he intends to convert personalty—cash—into realty. Upon the signing of the contract he incurs a debt to the amount of the contract price. If this debt had been paid in full and the realty acquired by him during his life, the property would have passed as real estate. As the right under the contract to ac-

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quire the realty is an interest in realty, it therefore passes as real estate. But the unpaid portion of the contract price is an outstanding debt which must be paid out of the personal property of the estate, thereby fulfilling the testator's intention to convert personalty into realty. The executor must pay this debt and thus enable the heir or devisee to demand a conveyance of the property from the vendor.

If, on the other hand, the testator entered into a contract to sell realty, he intended to convert it into personalty, cash. Upon the signing of the contract, he secured an obligation on the vendee's part to pay him cash and in turn the testator's title to the realty became subject to an obligation that it should be transferred to the vendee upon receipt of the selling price. This title so encumbered passes at the time of death to the heir, who, however, can receive nothing more than the testator had, and therefore takes the land subject to the obligation to convey. The right to receive the balance of the selling price is personal property and therefore becomes part of the testator's personal estate and goes to the executor. The heir secures nothing of value when title to this realty passes to him, because the executor can compel him to convey his title to the vendee upon the latter's paying the executor the balance of the selling price.

Review Questions

1. When is real estate sold? Where does real estate go on death of the owner? When may a representative collect rents?
2. When is real estate used for paying debts? When may an order to sell real estate be had?
3. In your state, what is the prescribed procedure to raise money from real estate? Should a sale of real estate be approved by the court? Why is it necessary to follow this prescribed procedure closely? May the representative buy in the property himself?

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4. When an executor is directed by will to sell real estate, are the proceeds treated as real estate? What is equitable conversion? Why is real estate usually directed to be sold?
5. If a testator has signed a contract to purchase realty, who pays the price? Who takes the real estate so purchased?
6. If the contract is to sell real estate, who receives the price paid? Who has to execute the deed passing title to the land?

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CHAPTER XVII

PAYING AND DELIVERING LEGACIES

§ 128. Definitions

A legacy is defined as money or other property left by will. Its synonym is a "bequest." It signifies a gift of personal property made by will as distinguished from a devise or gift of realty.[1]

A general legacy is a legacy in which the moneys or goods are to be taken from the mass of the property.

A specific legacy is the bequest of particular money, particular securities, or a particular thing—pointed out and distinguished from any other.

A cumulative legacy is a further legacy added to a previous legacy.

A lapsed legacy is a legacy left, say, "to my brother if living at the time of my death," and the brother dies before the testator.

A demonstrative legacy is a general legacy providing for a gift of money payable out of a specified fund, such as a certain savings bank deposit.

A residuary legacy is a legacy that includes all the property not otherwise disposed of.

A devise is a gift of real property made by will. The party who takes a devise is called the "devisee."

A legatee is the party who takes a legacy.

A legacy or a devise may be void if the party to take is uncertain. Not all corporations may take as legatees or devisees. It would depend on the corporate character and the law of the state regulating corporate powers. Subscribing wit-

[1] Century Dictionary.

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nesses to a will are thereby disqualified to take as legatees. A person named in a will as executor would in most states be disqualified to act as executor if he had acted as a witness, but might be appointed administrator. Generally any person may take under a will.

§ 129. General Legacies

A general legacy does not call for the delivery of any particular thing. "I leave to my cousin Amos Bardsley of Salem, Massachusetts, the sum of Fifteen Hundred Dollars," calls for nothing specific and expresses a general legacy; but "I leave to my nephew Andrew Calkins the gold watch presented to me by the Directors of the Second National Bank of Belfast," is not general, for it specifies one particular object. If it had been "a gold watch," it would have been general, for any gold watch would have answered, or failing to find such an article, the executors could buy a gold watch when the time came to deliver the legacy. (But see § 137.)

§ 130. Specific Legacies

A legacy of "My law library to my partner John Hanan" would be specific. So would a legacy of "the oil painting entitled 'Sunset' by George Innes," or a legacy of "my Marmon car," or of "ten one thousand dollar bonds of the City of Cleveland, issue of 1914, numbered 521 to 530 inclusive."

Certain legal rights would depend on whether the bonds were general or specific, which makes the matter of classification of some importance. For instance, if there was deficiency of assets the general legacies would all be abated but the specific legacies would all be paid in full. Demonstrative legacies take precedence over other general legacies.

§ 131. Residuary Legacies

It is not possible usually so to distribute an estate that the specific and general legacies exactly exhaust the assets, so it

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is usual to conclude "All the rest, residue, and remainder of my estate I leave to my wife May Andrews."

This would include everything not otherwise bequeathed. It is customary and always best to have such clause to include everything that is left, and so to provide for the utilization of lapsed legacies or other unexpected additions to the amount of the estate.

§ 132. Conditional Legacies

The testator may make his legacies or devises conditional. A legacy to a son, to be paid if he graduated from college or was admitted to the New York bar, would be legal. In such case the property should be left in trust to be paid over on the fulfilment of the condition, and it should be provided that if at a certain time the condition had not been fulfilled the legacy should lapse and should be paid over to some other legatee. In the same way a reasonable condition as to marriage might be sustained, as a legacy to a nephew provided he should be married before he was thirty years of age.

A condition that the legatee should live in a particular place might be sustained if there was some good reason for the condition and nothing against it. Such a condition is usually attached to a bequest of a dwelling place. In all such cases the testator should provide that the property bequeathed should go elsewhere in case of breach of condition. The executor does not continue his task after the estate is settled, and in event of the violation of a condition after his discharge it should be made the interest of someone to enforce it.

The conditions of a trust created under a will would be enforced and the income paid over, unless the conditions were against law or good morals. A married man may leave property in this way, the income to be paid his wife conditioned against re-marriage. A woman may leave property to her husband in the same way. In all other cases a positive condi-

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tion in restraint of marriage would be void. A father may, though, impose restrictions as to marriage with classes of persons, as a legacy could be conditioned on the legatee's marriage to a member of the Society of Friends.

It is common in wills to provide that any legatee who contests the will shall thereby forfeit his legacy. It is against public policy to terrorize those who might have good cause to contest a will, and if a will procured by fraud or undue influence could stifle legitimate inquiry as to the conditions under which it was executed, it would make fraud the easier. On this account such conditions are not always enforced by the courts.

§ 133. Vested Legacies

A legacy is vested when there is someone in existence who is to take the legacy and every condition has been fulfilled. Generally a legacy vests at the death of a testator. A legacy "to my friend George Giddings, if he be living at my death," would vest if the legatee was alive at the time the testator died. If the legatee should die immediately after the testator died, his heirs would take the legacy, and his executor could demand it. A legacy simply to "Henry Allen" is held to be personal and lapses if he dies before the testator. This lapsing could be made more positive by adding "if living at the time of my death," and could be prevented by making the legacy to "Henry Allen or his heirs."

A legacy may be based on a contingency, in which case it will not vest until the contingency occurs. A legacy to be paid to "my nephew James Willard upon his admission to the New York bar within four years from his majority, and at the expiration of that time if he has not been admitted to the New York bar said amount shall be paid to the Legal Aid Society of the City of New York," would be a contingent legacy with a gift over if the contingency did not occur.

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§ 134. Bequests Void for Uncertainty or Perpetuity

A bequest that is uncertain in its description of its object may be held void. If a man left property to be divided among the deserving poor of his native village, it would probably be held void for uncertainty.

Any attempt to tie up property from absolute ownership for long periods is against public policy and the courts look upon such efforts with a hostile eye. The usual rule is that property may be held in trust and the income paid out year by year for the period of "a life or lives in being and twenty-one years more." It would not be legal to let income accumulate even for this period. (See § 28.)

§ 135. When a Legacy Is Payable

A legacy in most cases vests at death. If there are unpaid debts, they are prior claims and must be paid before any part of the testator's estate can be applied to the payment of legacies. To give the representative time to find out whether the payment of debts may leave nothing with which to pay legacies, the rule is that no legacies need be paid for a certain period, usually a year from the time of the testator's death or of the issuance of letters testamentary.

If executors pay legacies at an earlier date, as they often do when the estate is large and the outstanding debts can be easily met, they pay at their own risk. In such cases the executor may protect himself by taking a bond for repayment if outstanding debts make it necessary.

When an annuity is given, the first payment need not be made until one year after the death of the testator unless the will specifies a different date.

Interest is payable on an unpaid legacy after the year's delay; that is, it draws interest from the date when it is payable. Any income from a specific legacy after date of death belongs to the legatee.

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§ 136. To Whom a Legacy Should Be Paid

Primarily, the legacy should be paid to the legatee entitled to receive it. If the legatee has died, his executor or administrator is the proper person. If the legatee is not of age, a guardian of his property must be appointed to whom the legacy is to be paid. Payment to the minor or to his parent would not be safe. If a legatee is not sane, the payment should be made to his guardian or committee.

If a legacy is to someone to hold in trust for another, the trustee is the proper person to receive the legacy; but, before this is turned over, the trustee must have his appointment confirmed by the probate court, and should file the required bond and secure whatever authorization the state laws require. If the executor himself is to act as testamentary trustee, he should be specially authorized to act in this capacity and in his accounts should distinguish between his holding as executor and his holding as trustee.

If no trustee has been named or the trustee named refuses to serve, or for other reason there is a vacancy, the probate court will usually appoint a trustee to fill the vacancy. Until this is done, it is the duty of the executor to hold and care for the legacy.

§ 137. Delivery or Payment of Legacy

A specific legacy should be identified and delivered. If it were an article or articles that involved selection, the legatee would have the right to choose. If the legacy is of shares of stock or an amount in bonds, the will would be satisfied by any shares or any bonds of the kind specified. If the legacy was cash, it should be paid in legal tender; usually the executor's check on a responsible bank is the most satisfactory for both parties.

If any state inheritance tax has been paid or is to be paid, it should be deducted from the amount to be paid over.

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§ 138. Abatement of Legacies to Pay Claims

If claims are allowed to such an extent as to leave insufficient assets to pay all the legacies in full, some of these must be cut down or "abated." The order in which this is done is as follows:

1. General legacies are abated proportionately, if that will yield enough to pay all claims. If necessary, all of the general legacies will be exhausted.

2. Specific legacies will be taken and sold if there are debts not paid and the general legacies have all been utilized.

3. Real estate may be sold to pay debts after the personalty is exhausted, if the representative receives an order or license to sell from the judge of probate. (See Chapter XVI.) In such case any surplus would go to the heir or the devisee.

A will which directs real estate to be sold to pay debts gives the executor authority to sell real estate before abating legacies. In some cases wills direct the sale of land to pay legacies.

§ 139. Refunding Legacies

Legatees may be required to refund if it is necessary to pay creditors. An executor should not pay legacies while there are unpaid debts, but if he does, he should require the legatees to give him bond to refund if it should become necessary to enable the executor to meet lawful claims against the estate. If he does not take a bond, he can proceed against the legatees by a suit in equity. In such a suit the executor would have to show: (1) that creditors were still unpaid; (2) that the legatee had received assets from the estate; (3) that no unappropriated assets remained; and (4) that the deficiency was not caused by the executor's waste or mismanagement.

The objective is: (1) to pay all creditors, and, (2) so to arrange any refunding that all legatees of the same class fare alike. If the executor has favored any particular legatee

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in payment, the legatee will not be allowed to profit, but will be compelled to contribute to make good the general deficiency.

§ 140. Residuary Legatees

After payment of all debts and all general and specific legatees, it is the duty of the executor to turn over the residue or surplus of the estate to the person or persons designated as residuary legatee or legatees. This residue may be in money or securities or other personal property, depending on the directions of the will.

If, as is sometimes the case, the will fails to designate the residuary legatees, the next of kin will inherit as provided in the laws of the particular state.

If there was no will, the administrator would sell the personal property, pay all creditors, and distribute whatever remained as directed by the statutes of the particular state.

In this country the rights of husband and wife in the personal property of the other in event of death are defined by the statutes in each state. After the statutory rights of the husband or the wife in the personalty of the other have been satisfied, the remaining personal estate is usually evenly apportioned among the children.

Review Questions

1. How are the various kinds of legacies distinguished? What is the effect if a legatee acts as a witness to the will?
2. What is a general legacy? Is "I leave my sister Mildred Ordway all the stocks and bonds in my safety deposit box No. 621—Guardian Trust Company's Vault" a general or a specific legacy?
3. What is a specific legacy? Would "I leave my daughter Amelia Barton 100 shares of stock in the Morton Trust Company" be specific or general? Which is more desirable from the legatee's standpoint, a specific or a general legacy? Why?

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4. Why is there usually a residuary legatee?
5. What is a conditional legacy or bequest? How would you phrase a legacy to be paid over on the fulfilment of a condition? How would you arrange the forfeiture of a legacy if a condition were not observed? Is a legacy in restraint of marriage good? Is a proviso that any legatee contesting the will should forfeit all bequests under it good? Why?
6. What is a vested legacy? If a legatee dies before the testator, what happens to the legacy? If a legacy is based on a contingency, is it vested?
7. If a bequest does not describe the legatee certainly, what is the effect? What is the objection to perpetuities? In your state how long may property be tied up?
8. When is a legacy payable? When does it vest? When does a general legacy begin to draw interest? In case of an annuity being left, when should the first payment be made?
9. If a legatee dies, to whom should the legacy be paid? If the legatee is a minor? If the legatee is not sane? What should a trustee do before a legacy may be paid to him? If there is no trustee to take the trust, what must the executor do?
10. How should a specific legacy be delivered? How should a cash legacy be paid?
11. In what order are legacies and devises cut down to pay debts? How are specific legacies treated to equalize the abatement?
12. If the executor pays legacies before he has assembled all claims, can the legatees be made to refund? At whose expense would suit for refund be?
13. If the will fails to designate the residuary legatee, who is entitled to the residue? In case of husband and wife, what is done with the personal property in your state?

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CHAPTER XVIII

GUARDIANS FOR MINORS

§ 141. Definitions

A guardian is one who, in the absence of the proper parent or parents, protects and looks after the person or property or person and property of an infant during his period of minority. A guardian of the person is said to be *in loco parentis,* or in the place of the parent for the time being. The infant under guardianship is legally known as a "ward."

Guardianship of Person. It must be remembered that there are two kinds of guardianship, that of the person of the infant, and that of the property of the infant. A father has the first right to the guardianship of his children and upon his death the mother becomes the natural guardian. The father may have appointed a guardian of the person of the infant other than the mother before his death, but in the absence of good cause for such action on the part of the father, the court will disregard his directions and continue the natural guardianship in the mother.

Guardianship of Property. But a father may bequeath the guardianship of the property he leaves to his child to someone other than the mother, the custody of the child remaining in her. This procedure is approved by the courts for the reason that the guardian chosen should be a person of business experience and ability and would probably be better fitted than the mother to look after the property left to the child.

§ 142. Common Law and Statutory Guardianship

All the states have not passed statutory rules on the question of guardianship, and for that reason the rules of the

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common law still apply to some extent. The one kind of common law guardianship that in a modified form exists in this country is here given and explained.

§ 143. Guardianship in Socage

Guardianship in socage occurred only when the infant had some interest in land or would inherit real property. Land held by the ancient tenure of a certain service or a price certain in lieu of such service was said to be held by "socage" tenure. The guardianship of the heir to such an estate was given to the next of kin of proper age and qualifications, by whom the land could not be inherited. Thus no temptation was given to the guardian to abuse his trust with the hope of reaping any profit. A guardian in socage had charge of both person and property of the infant, and the guardianship continued until the infant was fourteen, when he would choose his own guardian. This kind of guardian, however, had charge only of the real property obtained by descent and had no control over any personal property that the infant might have. In New York it was decided that a statutory guardianship originating by testamentary provision was analogous to the guardianship in socage, and that in accordance therewith such a guardian had no authority over the personal property of his ward. In the particular case, the father as guardian took over an insurance policy and got the insurance company to give him its surrender value. When the eldest child came of age, he was appointed guardian for the younger children and brought suit against the insurance company and compelled it to refund the money they had already paid the father.[1]

§ 144. Statutory Guardianship

In the many states that have adopted statutory law on this question, there are for the most part few classes of guardians.

[1] Foley v. Ins. Co., 138 N. Y. 333.

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Testamentary guardians and probate guardians are the usual forms under the statute law. A testamentary guardian for either the person or the property of the infant is one appointed by the parent or parents of an infant by a written will or other instrument. Such guardianship must, however, have the approval of the court of probate judging the will, and the court, if it thinks it necessary, may demand a bond or surety before officially ratifying the appointment of the guardian.

A probate guardian is one chosen by the court probating the will for either the person or the property or both of the infant. An infant over fourteen years of age has the privilege of choosing his guardian, but his choice must always be approved by the court, and therefore amounts in the end to the choice of the court.

From the two foregoing paragraphs it will be seen that under statutory provisions guardians may be for the person or the property of the infant without being classed under any particular name, aside from the fact that they were selected by the parent or by the court. In the majority of cases the guardian appointed takes care of both the person and the property of the infant. The natural guardians are the father and the mother and on the death of either the remaining parent becomes guardian. Except in rare cases of marked unfitness the courts will not disturb the relationship.

§ 145. Appointment of Guardian

A court will never appoint a guardian where it is not necessary, and then, not until a petition has been presented asking that it do so. The manner and the form of such petition are explained later in this section.

The first consideration of the court in regard to the appointment of a guardian will be to promote the best interests of the infant. Its appointment will, of course, be largely influenced by the wishes of the parent or the desire of the infant

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if it is old enough to have an intelligent choice. This matter of the welfare of the infant may even prevent the court from appointing one of the parents if someone else interested in the child and capable of giving it better care is willing to become the guardian. The court will never appoint a foreigner. The general opinion of the court on this matter of choice may be well shown perhaps by the following excerpt:

> While the Surrogates Court is vested with a discretionary power to appoint a stranger, the guardian of the person and estate of an infant, such power will not, *other things being equal*, be exercised where a relative of the infant is in existence and is competent and desirous of being appointed.
>
> Where one sister of an infant applies to have a trust company appointed guardian of the infant's estate, and another sister of the infant applies to have herself appointed guardian of the infant's person and estate, the Surrogate may properly appoint the trust company guardian of the infant's estate, and the opposing sister guardian of the infant's person.[2]

Procedure for Appointment. The exact method or procedure for the appointment of a guardian differs in the various states, and the statutes of the particular locality in which it is desired to have a guardian appointed should always be consulted. The usual procedure, however, in almost every state where this law is statutory, is about as follows:

The infant, if over fourteen, or else a relative or a friend, will present a petition to the court, stating the name and the age of the infant, the name, age, and residence of the person proposed as guardian, the relationship between the infant and this proposed guardian, and the value and the situation or condition of the infant's property.

After this petition has been presented to the court, the court will find out for a certainty the age of the infant, and

[2] Matter of Buckler, 96 App. Div. (N. Y.) 397.

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if over fourteen will ascertain if the guardian nominated by the infant was his own voluntary choice. The court will also ascertain the exact amount of the property, both real and personal, and with this knowledge fix an adequate bond or security to be given by the guardian.

This petition must, of course, be presented to the probate court in the jurisdiction where the infant is living. All persons, such as a surviving parent or relative, who may be interested in the selection of the guardian and in the care of the infant's estate, must be cited to attend in the same manner in which it is done in the probate of a will, and they then have the opportunity of sending in protests, appearing personally to object to the choice, or of waiving notice, thereby signifying acquiescence in the court's choice of guardian.

§ 146. Rights and Responsibilities of Guardians

A general guardian is entitled to the custody of his ward, and may move the child, where necessary, to some other town or city within the same state. He may not change the infant's domicile to another state without good cause, but must show to the court having jurisdiction sufficient and satisfactory cause for so doing.

The guardian is entitled to either a commission or a reasonable compensation for his work, according to the statutes of the jurisdiction in which he performs his duties as guardian.

A guardian's duty is the same as that of a parent—to maintain the infant in such manner as the income from the property will allow, to protect it, and to give it an education in keeping with the position in life it will assume after coming of age. There is no liability upon the guardian to care for the infant with his, the guardian's, own money; and therefore if there is no estate the ward may be put to work when he reaches the age allowed by law, and in the meantime may be placed in the care of some charitable organization.

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§ 147. The Guardian's Care of Property

The guardian must look after the property of his ward with skill and diligence, and his standard of care will be that of a reasonable man in caring for his own property. Unauthorized acts of a guardian may be excused by the court if they were such as would benefit the infant, but if this were not the case the court would hold him responsible for such acts.

The guardian should never spend more of the estate than the income acquired therefrom, but the court, in its discretion and where it thinks necessary, will allow certain of the personal or the real property of the infant to be sold. The real property must never be sold unless it is necessary for the infant's maintenance, but when necessary the court will give the guardian permission to sell it.

The guardian should keep all moneys in connection with the infant's estate in a separate account. If this is done he is under no responsibility should the bank fail or some other accident happen.

As soon as the guardian has ascertained the amount of the infant's property, the income, and the amount of expenses each year, he should take any surplus and invest in approved and safe securities classed as legal investments for trust funds or put the surplus, if small, in a savings bank, in order to increase the infant's income as much as possible. If this is not done within a reasonable time, he will himself be liable for interest on such surplus lying idle, just as in the case of a trustee. (See §177.)

The guardian is required by the court to make an accounting at various times showing the condition of the estate in his care. The infant, whenever he may think it necessary, may bring an action by a next friend for an accounting or to restrain the guardian from abusing his trust. The court will also help an infant to the best of its ability where the guardian has stolen or wrongfully conveyed property of the ward.

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In New York the law requires an annual accounting, but the rule is not enforced unless the court is asked to act. Banks and trust companies always file such annual accounts voluntarily.

Where a gift of any of the property has been made to the guardian by the ward, the court will scrutinize the gift carefully to be sure that it was voluntary, that no undue influence was used, and that the infant was capable of making such a gift without injury to his estate.

§ 148. Termination of the Guardianship

A guardianship will terminate: (1) when the infant comes of age; (2) where the infant marries, though still in his or her minority; (3) by the death of either infant or guardian; or (4) by the resignation or removal of the guardian.

Although guardianship of the person terminates when an infant marries, a guardian will still have authority over the property of a male ward.

A guardian may always resign, or, for neglect or carelessness in his duties, be removed by the court of probate. Natural guardians (parents) may always be removed for neglect of their duties, but may not *resign* their guardianship.

When the guardian's authority is to be brought to an end, he must file a final account, and when this has been examined by the court and approved, it closes up all matters pertaining to the particular guardian with the estate.

Review Questions

1. What is a guardian? What is the distinction between guardianship of the person, and guardianship of property?
2. Can a guardian in socage control the personal property of his ward?
3. In your state, what are the usual forms of guardianship? What is a testamentary guardian? What is a probate guardian? Who are the natural guardians?

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4. When is it necessary to appoint a guardian? What is the object of appointing a guardian?
5. What is the procedure to appoint a guardian for a minor in your state? Who should be cited to be present?
6. What rights has a general guardian? In your state, what compensation does a guardian receive? How must he maintain his ward? How must he care for his ward's property? What is his duty as to accounting?
7. What terminates a guardianship? For what may a guardian be removed?

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CHAPTER XIX

PARTNERSHIPS AND PARTNERSHIP PROPERTY

§ 149. Partnerships and Corporations

A weighty argument for corporations as organizations for the transaction of business by two or more, is the great simplicity of a settlement in case of death. If a man is doing business in corporate form, his interest is represented by a few stock certificates in a safe deposit box. As soon as his will is probated, his executor takes possession of these and they are in shape to be pledged or sold to raise money or to be handed over to legatees. Meanwhile the business is not interrupted. The organization is not changed and the value of the interest is not depreciated.

In a partnership, on the contrary, the death of a member of the firm ends the co-partnership, and necessitates a winding up of its business and a settlement of its affairs. The executor has no control of a partnership business. The surviving partner or partners have possession for the purpose of winding it up. Even if the surviving partners buy the share of the deceased partner, they virtually close the old business and organize a new one.

The process of adjusting a partnership business after a death is tedious and troublesome and may involve considerable loss. The corporation with negotiable shares of stock is in much better shape when a death occurs, as regards the disposal and settlement of the affairs of the deceased.

§ 150. Effect of Death upon a Partner's Interest

A partner's interest is usually evidenced by the partnership agreement, or, as it is commonly termed, the "articles of co-

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partnership." A partnership is formed by the partners mutually signing the articles and each investing to the amount agreed upon, and becoming each personally responsible for the acts of the other partner or partners. Each is an agent for the others in all transactions that pertain to the partnership business.

This relation of mutual agency is terminated at once by the death of a partner. The estate of the deceased may be held responsible for what is done up to the time of death. But death terminates the authority of anyone to bind him, and his estate is entitled to whatever interest he had in the business at the time he died. It then becomes the duty of the surviving partner or partners to close out the business to the best possible advantage, to pay all claims, and to turn over to the personal representative whatever part of the surplus belongs to the estate of the deceased.

The executor or the administrator has no interest in the partnership business. He must, in making his inventory and appraisement, estimate its value. He is entitled to receive the value of the deceased partner's share when ascertained. He may bring an action to force settlement, but interferes with its management at his risk.

§ 151. Executor's Risk in Busines

Generally, the function of an executor or an administrator is to settle the estate, not to prolong its existence. In case of a partnership, the surviving partner has sole authority and the personal representative has no call to do anything unless the surviving partner is delinquent in his duty or shows bad faith in what he does.

If the decedent has been conducting a sole business, the representative will have to conduct it to such extent as is necessary to close it up to advantage, but no further. It is obvious that a going business cannot be closed up in a day without serious

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loss. If, under such circumstances, the representative keeps up the establishment, he will be justified, and will not make himself responsible for loss or for debts incurred in good faith.

In such a situation the executor could make his own position safer by obtaining permission from the court of probate to continue the business. The court would grant this if good reason were adduced.

The personal representative may also continue a going business with the consent of those interested, supposing that they are of age and competent. In such case he would incur no personal obligation in event of loss.

Another situation that may develop is when the will directs the executor or executors to continue the business for a certain period or to accomplish certain purposes. An authorization by will would relieve the representative from all liability.

If the representative continues or starts a business on his own initiative, with assets of the estate, he would be a wrongdoer and when found out he would be liable for all losses and for all debts incurred; but if he had made any profits these would all belong to the estate.

§ 152. Inventory and Appraisement

It is the duty of the personal representative to prepare an inventory and appraisement of all property belonging to the estate. One schedule of this will call for a statement of the interest of the decedent in any co-partnership or business. The name of the business should be given, the nature and location, the total capital, the gross profits, the expenses, and the net profits, for the three years preceding.

Strictly speaking, neither the personal representative nor the appraiser has authority to investigate the books or assets of a partnership business prior to the formal accounting by the surviving partner or partners; but in most cases data could

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be had for the appraisement as a matter of courtesy. In event of any difficulty, the receipts from the business by the decedent in previous years and other personal data would give basis for a fairly accurate estimate, subject to correction later.

§ 153. Sale of Partnership Interest

If an interest in a partnership is one of the inventoried items of an estate, the executor or the administrator has the right to sell it as a whole if this can be done to advantage.

If a new party acceptable to the surviving partner or partners, desires to come into the business, he may be willing to pay more, as a lump sum, to come in without delay for formal settlement and accounting than would be likely to be obtained by the usual procedure. In such case the representative can probably get authority from the court to accept the offer, or if the beneficiaries are competent to consent, he can protect himself by obtaining such consent.

Also, the offer might be made by a responsible party, to buy the partnership interest of the decedent for whatever an accounting plus a certain appraisement for good-will, tradenames, etc., might amount to. In such case, it would seem to the interest of all parties that the sale should be made.

Again, an offer might be made by the surviving partner or partners to buy out the interest of the estate, and if it were a fair offer of a sum certain, or to be ascertained, it might be best that it should be accepted.

§ 154. Settlement of Business by Surviving Partner

The death of a partner of itself dissolves the partnership relation. The survivor has the legal possession of the assets and the right to close up the business—selling the assets, collecting outstanding debts, paying all claims, and turning over the deceased partner's share to the executor or the administrator.

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In so closing the affairs of the partnership, the surviving partner has the right to work at his own discretion without interference or direction from the personal representative, to whom he is responsible only for the final result. It is the duty, though, of the surviving partner to be careful and skilful in all matters, and to close up in such shape as shall net the most for all concerned. The good-will and the trade-name of a going business are often of great value. In settling, this value is to be preserved and turned to account if possible. (See §157.)

Where the surviving partner plays fair, he can close out to better advantage than can anyone else, and more will be saved for the benefit of the owners of the estate than could be obtained by settlement in any other way. A man's partner should be his friend, and he should be a man of honor and square dealing. On this account it often happens that men make their partners their executors. Such an arrangement has its obvious advantages.

A partnership agreement may provide that in case of death the partnership may continue until the end of the month or to the close of a six months' period if such extension would bring it to the end of a regular accounting period.

The surviving partner is not entitled to extra compensation or to make any charge for his services in winding up the business.

§ 155. Existing Contracts

It is the general rule that, in closing a business, existing contracts are to be filled and no new contracts are to be made. In a professional partnership—law, engineering, or medicine—this would naturally be the practice. In a mercantile business, in order to close out advantageously it might be necessary to order more goods from time to time while selling out in order to keep up a due assortment.

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§ 156. Sale of Assets

The surviving partner sells the assets at his discretion. He may sell them out in the usual course of business, or he may sell them in lots to other dealers, or he may sell them at public auction. He is himself a party in interest and so is likely to adopt such plan as is most profitable to himself and the owners of the estate. If he can sell the business as a going concern for an adequate price, that may be best, and he cannot be called to account unless bad faith is shown. If he does not wish to continue the business himself, it would seem that a sale of the business as a whole would be simplest and should produce the largest result.

§ 157. Disposition of Good-Will

In all cases the good-will has an actual value, and it is to the interest of surviving partners and beneficiaries that it should not be dissipated. In modern times, by means of extensive advertising, the good-will of some establishments is worth as much or more than the tangible assets. (See discussion of this in connection with the transfer tax, § 293.)

Good-will is legally defined as "every possible advantage acquired by a firm in carrying on its business, whether connected with premises or name or other matter." [1]

The surviving partner's own interest should lead him to dispose of the good-will to the best possible advantage. Difficulty in some cases arises where the surviving partner tries to settle up the business so that only the bare value of the assets is accounted for, while he arranges to continue the business so as to secure the benefit of the good-will for himself.

If anything like this is attempted, it is the duty of the personal representative to look into it, and if there is adequate evidence the court will require the surviving partner to account for the value of the good-will to the estate.

[1] 17 Am. & Eng. Encyc., p. 1184.

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§ 158. Paying Debts

In settling the affairs of the estate, the personal representative must satisfy all claims against the estate before he pays over and delivers legacies or distributes the surplus to those whom the law designates as entitled to receive it. In like manner a surviving partner must pay all debts outstanding against the business before he has any surplus to divide between himself and the executor or administrator. If the business was not solvent, there would be an excess of firm debts, in which case the private property of both the decedent and the surviving partner would be answerable for the deficiency. Any private creditors would be paid from the assets of the estate, and the partnership creditors from the partnership assets; then, if the creditors of either class were not fully paid, they would have the right to be paid from any surplus in the other class of assets.

§ 159. Dividing Surplus

After the assets have been sold and all of the firm's obligations have been paid, the surviving partner should prepare a plain accounting statement of what he has done, and submit it to the personal representative and pay him the amount due the estate of the deceased partner as shown by said statement. In ascertaining the surplus, it is necessary first that any advances above the stipulated investment of capital by the partners be returned to them or credited to them. Then the capital investment of each partner is returned to him or credited to him. And last, any surplus remaining would represent profits, and it would be apportioned among the partners in such way as the partnership agreement prescribed, or if nothing had been specified, it would be divided equally.

The receipt of the executor or the administrator is all the evidence of settlement that a surviving partner gets. The executor may properly ask that the settlement of the winding

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up be verified by a competent accountant at the expense of the estate.

§ 160. Provisions for Death in Articles

Men have made partnership agreements in which they have mutually agreed that in case of death the survivor should own the whole business, and the estate of the deceased partner should have some stated or ascertainable amount. Such an arrangement has been held by some courts to be a legacy and not enforcible unless the contract was drawn up as a will.

This does not seem reasonable and has not been the rule in other courts. A fair arrangement for the surviving partner to buy out the interest of the deceased partner at a suitable price has been upheld by the courts of New York and Massachusetts, and by the federal courts.

In McKinnon v. McKinnon, 56 Fed. 409, the partnership agreement provided that the junior partner was to have the partnership business and property if the senior partner died without immediate family. This was sustained by the United States Circuit Court. The court said:

> The consideration which supports the partnership agreement is the mutual promises of the partners to become partners, and to conduct the partnership business on the terms mentioned in the partnership agreement.

A Massachusetts court sustained a partnership agreement to this effect: "The surviving member of said partnership upon payment to the widow or personal representative of the deceased partner of the sum of $3,000 shall own said business, stock and good will." The court said:

> There are sound reasons why a fair agreement entered into by partners, as to the disposal of partnership property in the event of the death of one or more of the partners should be sustained. The terms of such an agreement made

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by those most familiar with the real character of the property are quite as likely to be just as an arrangement made after the decease.[2]

A New York court sustained a provision to this effect: "The surviving partner is to purchase the share of the deceased partner at the net value of his share as shown by the last annual balance sheet, with interest at 4% from the date of the balance sheet." [3]

Such a plan should include some method of determining the value of the tangible assets from the books or from the last inventory, and the good-will from the average profits for a period three or five years previous. Then provision should be made for payment in cash or notes, in such shape that it may be practicable for the surviving partner to manage the payments without inconvenience.

Another plan that has merits is for the firm to insure the lives of its members for such an amount as will pay out the interest of each. Then, at death, the policy provides at once the cash to pay for the deceased partner's share, and the business is neither interrupted nor embarrassed.

Review Questions

1. What advantage has the corporate form of organization in case of death? What makes a partnership interest difficult to turn into cash?
2. What is the evidence of a partner's interest in the business? What is the relation of mutual agency in partnership? What is the effect of death on a partnership? Whose duty is it to close up a partnership? What is the executor's duty?
3. If the decedent had a sole business, what would be the representative's duty? If it is best to continue a sole business, how

[2] Murphy v. Murphy, 217 Mass. 233.
[3] Matter of Columbia Trust Co., 169 App. Div. (N. Y.) 822.

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may the representative protect himself? If a representative starts or continues a business on his own initiative with assets of the estate, what is his liability?

4. What details of a partnership interest should be given in the inventory? How are the data of a partnership interest to be obtained for the inventory?
5. May the personal representative sell a partnership interest as a whole? Would he require an order of court or the consent of the beneficiaries to do this? Why would he ask such an order or consent?
6. What effect on a partnership has the death of a partner? What is the duty of the surviving partner? What right has the surviving partner?
7. What is the rule as to new contracts?
8. How should the surviving partner sell the assets?
9. What is good-will? What is the duty of the surviving partner in regard to the good-will? When will the court act?
10. Who pays the partnership debts? If the business were insolvent, how would the estate be affected?
11. After the business has been closed, what should the surviving partner do? How is a partnership surplus ascertained? What evidence of settlement does a surviving partner receive?
12. May partners contract in the articles for a settlement in case of the death of a partner? What are the advantages of such an arrangement? What should such arrangement provide for? How may the death of a partner be provided against by insurance?

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CHAPTER XX

RENUNCIATION, REVOCATION, AND RESIGNATION

§ 161. Definitions

A renunciation, in the sense in which it is here used, is the refusal by the person named to accept the appointment as executor or trustee under the provisions of a decedent's will.

A revocation is the removal from office of an executor or an administrator by the court because of some irregularity in his appointment, or because he has done something which renders him unfit for the position of trust which he holds.

A resignation is the voluntary giving up of the office of executor or administrator with the consent of the court.

Renunciation may take place only before letters have been issued, while revocation and resignation come after letters have been issued and the executor or administrator has started on his work of settling the estate.

§ 162. Acceptance

The proposed executor's acceptance is shown by his taking out letters testamentary and probating the will. He must either accept or reject within a reasonable time after the testator's death. The court, if it so desires, may summon the proposed executor to appear before it and say whether he accepts or rejects the office. Where this is done and the executor fails to appear, he may be punished for contempt of court.

§ 163. Renunciation

When a person is named as executor in a decedent's will, he may either accept or reject the office. He cannot be forced

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into taking it under any circumstances. He must refuse it entirely; he may not reject part of the appointment and accept another part.

A renunciation is usually conclusive, though by statute in some jurisdictions a renunciation may be revoked or recalled by the nominated person unless someone else has, in the meantime, been appointed administrator with the will annexed by the court.

Although a person may, during the lifetime of the decedent, have said that he would accept the office of executor, whereupon the testator appointed him his executor, this will not keep the executor so nominated from refusing to accept the office after the death of the testator. If, however, the testator has, because of the promise given him, made the proposed executor also a beneficiary under the will, the executor will forfeit this legacy by his refusal of the office. He may, however, refuse the office and still retain the legacy where it is quite evident that the legacy was left him in his individual capacity and not in consideration of the work he was to perform as executor.

> The death of the sole executor named in the will, before having either taken or renounced probate, leaves a vacancy, whether the death occurred during his testator's life or later, which must be supplied as in case of a formal renunciation.[1]

Anyone who meddles with the estate before authority has been given him to handle it at all, will be barred by the court, where damage has been done, from renouncing his position of trust in order to escape the liability of his misdeeds.

The court will not accept the renunciation of anyone who, for a consideration, agrees to give up his appointment as executor in order that some other party may have the opportunity of gaining the office.

Where there are two or more executors and the renuncia-

[1] Schouler, Wills, Executors and Administrators, Vol. II, p. 1045.

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tion of one makes no difference to those who remain, the court will grant letters to the remaining executor or executors, or appoint persons to fill the places made vacant, if the estate will be better served by the original number of proposed executors. (See Form 14.)

§ 164. Revocation

Revocation of the authority of an executor or an administrator or removal from office of an executor or an administator, occurs usually after letters have been issued by the court, although there is one so-called revocation that is an exception to that rule. (See also §167.)

§ 165. Revocation by Testator

The only time in which revocation before letters are issued can occur, is where during the lifetime of the testator he destroys one will and makes another in which he appoints a different executor from the one named in the foregoing will. Such a revocation takes place whether the proposed executor is aware of the fact or not, but in most cases the making of a new will causes little confusion as to executors, for the same executor or executors are usually appointed by the testator in his new will.

As the executor is not appointed until the death of the testator, it is not, strictly speaking, correct to call such a change of executors a "revocation."

§ 166. Procedure for Removing Representative

The procedure for obtaining revocation of the authority of a representative is for a creditor, or a person otherwise interested in the state of the decedent, to present to the court by which letters were issued, a petition written out and verified, asking the court to revoke the letters given to the representative, giving the reason why revocation is desired, and asking

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that the representative be cited to attend a hearing for the purpose of defending himself.

The representative must then be given notice and a certain period of time within which to appear before the court and plead his cause. Also all persons interested must have due notice of the hearing. At this hearing both the party bringing the complaint against the representative and the representative himself have the right and opportunity to offer evidence to prove or to disprove the charge brought. If either party is not content with the judgment of the court in the case, he may appeal to a higher tribunal, just as in any other lawsuit.

While discharge from office relieves the representative from any further liability, it will not relieve him of responsibility for any wrong or damage done to the estate from his fault while the estate was in his care.

§ 167. Revocation by Probate Court

Revocation by the court may occur through many causes, of which those following are the most common:

1. Where there was mistake or fraud in obtaining the appointment.
2. Where an administrator was appointed although decedent left a will.
3. Where there was an appointment of a personal representative when the supposed decedent was not in fact dead.
4. Where there was an issuance of letters to the wrong person or persons.
5. Where the preference that should be shown to relatives when appointing an administrator has been ignored.
6. Where the renunciation of a preferred claimant for appointment has been forged or wrongfully obtained.

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7. Where the court issuing letters and probating the will had no jurisdiction to do so.
8. Where letters have been given without the issuance of the proper citations to interested parties.
9. Where the representative dies, becomes insane, or too ill to attend to his official duties.
10. Where the representative refuses to give a new bond when required to by the court, or is negligent in filing his inventory.

After the proper petition has been presented and the court has heard both sides and has considered the evidence presented, it may dismiss the proceedings or may remove the representative. It may also compel the representative to make a full and complete accounting of the affairs of the estate while under his care.

An executor or an administrator may not be removed because he refuses to prosecute claims which are doubtful, where the estate is small. He may not be removed because he refuses personal aid to the heirs while settling up the estate.

Absence of the representative from the state beyond a certain length of time or removal to another state will be a cause for removal, but good proof of this must be offered and the regular proceedings for removal instituted. The marriage of a sole executrix or administratrix may also be sufficient cause for removal by the court.

§ 168. Resignation

Removal without cause shown, or by way of favor to the incumbent, would be improper. For such causes, and as a gentler means of vacating an office unsuitably filled, our statutes further provide the opportunity for a fiduciary officer to resign.[2]

[2] Schouler, Wills, Executors and Administrators, Vol. II, p. 1156.

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Aside from this sort of resignation, the courts do not favor the resignation of a representative, and it is within their power to accept or to reject any resignation tendered them. The resignation of any executor or administrator must be based upon a good and sufficient cause or reason.

For these reasons there are few actual resignations in this office, and the representative once appointed usually continues until his appointment is revoked by the court or until the estate is settled, when he may apply for a release or discharge from his office.

The death of an executor or an administrator is treated not as a resignation but as a discharge by the court, and releases his estate from further responsibility. The representatives of the deceased executor may be compelled to settle any debts or liabilities of the executor incurred while he was handling the estate, and may also be compelled to render a final accounting of the estate in their testator's hands.

§ 169. Procedure for Resignation

Where, however, the representative does wish to resign, the statutory requirements are usually about as follows:

The representative presents to the court which issued letters to him a petition asking that his account be examined by the proper persons and be declared settled by the court upon a favorable finding of such persons; that a decree be made by the court revoking the letters issued to him, or allowing him to resign and giving him a discharge; and that the required persons be cited to attend in order to oppose his discharge if they so desire. This petition must also state the representative's reasons for wishing to obtain a discharge.

If this petition is favorably received by the court, it will proceed to order those acts enumerated in the preceding paragraph carried out. Then, when the representative has given the court a complete and final accounting and has turned over

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all books, papers and other property pertaining to the estate, which he may have, the court will make a decree discharging him from the office and ending all further responsibility on his part.

Review Questions

1. Distinguish between renunciation, revocation, and resignation.
2. How does one accept an executorship?
3. Is there any compulsion on anyone to accept an executorship? If the executor was a legatee under the will could he refuse to act? If an executor had interfered with the assets before appointment, could he renounce his trust?
4. Is the form of renunciation essential?
5. Who can revoke the authority of an executor or an administrator?
6. How may a testator change his appointment of an executor?
7. Who may ask for the removal of an executor or an administrator? How would he do it?
8. For what causes may an executor or an administrator be removed?
9. May a representative resign without cause? Is resignation common? What is the effect of the death of a representative?
10. What would be the procedure of a representative desirous of tendering his resignation? What may the court do in such a case?

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CHAPTER XXI

TESTAMENTARY TRUSTEES

§ 170. Trusts

It is common in wills to provide that the executors shall hold certain property or certain investments *in trust* for the benefit of a certain person or persons during the life of the person or persons or during the minority of one or more persons. In such case the executors become testamentary trustees; that is, trustees appointed by will. The testator has created a trust, and because it is created by the explicit words of the will it is called an "express trust."

The word "trust" has been used so long in this country as the designation of a business monopoly, that it is difficult to realize its actual meaning when used as a legal term in this connection by the creator of a trust.

Where property is transferred by the creator of a trust to another to hold for the benefit of a third person, a trust has been created. There must be: (1) the subject matter, (2) the creator or original owner, (3) the trustee, and (4) the beneficiary, or in legal phrase, the *cestui que trust*. Under the arrangement indicated the legal ownership goes to the trustee, but the third person has a beneficial interest in it and is said to have an "equitable estate" in the property. If the trust property was real estate and some trespasser damaged the property, the trustee would bring suit in a court of law; but if the trustee failed to pay over the income to the beneficiary, the latter would have to sue the trustee in a court of equity.

The selection of a person to hold property for the benefit of a third person involves putting faith and confidence in his

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integrity: literally, the creator *trusts* him with the property. Because of this he is termed the "trustee" and the arrangement is called a "trust," meaning thereby the obligation resting on a person to whom property has been given for a particular purpose, to apply the property for that purpose.

The foregoing may seem unduly drawn out, but it is worth some trouble to get a clear idea of the useful legal arrangement of a trust estate. The technical definition is "a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in priority to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in Chancery." [1] It is doubtful if this entirely clarifies the matter.

§ 171. Trustees

Any person capable of caring for property and transacting business may be made a trustee. In its origin it was largely a matter of honor and good faith, and the creator had literally to *trust* the trustee, in good faith, to carry out the trust. In those days the courts of common law did not undertake to compel a trustee to carry into effect his trust, nor would they punish him for breach of trust. It came about gradually that the courts of chancery or equity took jurisdiction of this matter and compelled a delinquent trustee to do his duty, or removed him when necessary, or held him liable for misfeasance or negligence. A reputation for honesty and fair dealing is still a qualification for the duties of a trustee, but now that the law holds trustees to stricter account, financial responsibility has become a prime requisite. For this reason corporations organized for the purpose, trust companies, and banking institutions, are largely used as trustees. Their advantages for this purpose are set forth more at length in Part V of this work.

[1] Lewin on Trusts, quoted in Encyclopedia Britannica.

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Where an estate is large, it is possible to get responsible men of business to act as trustees. In such cases they will open offices, organize employees, and handle the estate as an individual business. Where an estate is smaller, a trust company may be more satisfactory than a friend who cannot give it due attention without neglecting his own business.

A testamentary trustee must be of age, of sane mind, a resident of the state, not a felon, and not incompetent by reason of drunkenness, dishonesty, improvidence, or want of understanding.

§ 172. Testamentary Trustees

The statutory definition in New York [2] includes every person who is designated by a will or by any competent authority to execute a trust created by a will. It excepts from this an executor, an administrator with the will annexed, or a guardian. It includes, though, such an executor or an administrator when he is acting in a trust capacity that is separable from his functions as executor or administrator.

If property is left to a person with "precatory" words, that is, if the gift is accompanied by a wish that the legatee act in a certain way with the property or give part of it to someone else, in New York the gift is held by the courts to be absolute and the legatee is not a trustee and cannot be compelled to carry out the testator's wish; e.g., "Item fourth. It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister-in-law." In another state similar language might be held to create an enforcible trust.

To create an enforcible trust, the simplest and most certain method is to express it in so many words: (1) "I give (describe the property)" (2) "to (designate the trustee who is to take the legal title)," then (3) add the words "in trust,"

[2] N. Y. Code Civ. Proc., § 2768, subdiv. 6.

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and then (4) plainly state what is to be done, and (5) for whom.

The difference between the functions of an executor and a trustee is as follows: An executor's duties are to collect the assets, preserve from waste, pay debts and then legacies. A trustee's duties are to hold, invest, and care for the particular fund or property, and dispose of it or its income as directed by the instrument creating the trust.

An executor's duties as such are to settle and close up the estate. If part or all of the property is to be withheld from distribution, or if only the income is to be used, or be accumulated, then it is usually safest to leave it to a trustee.

It has been expressed by the Court of Appeals of New York as follows:

> Ordinarily, the only duties resting on an executor or an administrator are to take possession, collect assets, pay debts and retain the estate for distribution—all of which the statute assumes can be done in eighteen months, except in special cases, when a longer period is required. They have nothing to do with the real estate. The duties of a trustee are usually more extensive, more onerous, more responsible, and cover a longer period, and to them when real estate is the subject of the trust, are committed its care, preservation and management.[8]

It is common to appoint executors as trustees, so that the same persons settle the estate and then continue as trustees. In such case the parties execute two distinct functions.

§ 173. Executors Who Are Trustees

In a will where the executors named are also to act as trustees they should be expressly so appointed, the usual phrase being, "I appoint John K. Andrews and Walter Reynolds executors and trustees, under this will."

[8] O'Brien v. Jackson, 42 App. Div. (N. Y.) 171.

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It happens, however, in many cases that the testator will name an executor or executors, and will then direct them to hold property and to pay the income to minor children; and by thus imposing the duties of a trustee he creates a trust and the law considers them as trustees.

> It is a very familiar rule that the duties imposed upon a person rather than the name applied to him in the will should measure his office and position, and that when the duties of a trustee are imposed upon a person he will be regarded as a trustee rather than an executor.[4]

It is true that every executor and administrator is also held to the responsibility of a trustee—that is, it is a fiduciary relation; but an executor is not a trustee in the same sense that a testamentary trustee is.

One important difference is that when there are several executors any one of them can act alone. Trustees, however, must act jointly. They can do nothing except by united action.

Testamentary trustees are under the supervision of the courts of probate. The designation in the will would require appointment and issuance of letters by the probate court. A person designated as executor and trustee who had qualified and taken out letters as executor could perform all the functions of executor without necessarily agreeing to act as trustee, though usually in such case it would be assumed that he accepted the trust as well.

§ 174. Trustee's Bond and Oath

A testamentary trustee is appointed by the testator and is not necessarily required to give bond. If the testator should specify that his trustee give bond, the court would require a bond. In New York anyone interested in the fund may file

[4] Mee v. Gordon, 187 N. Y. 400.

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a verified petition setting forth his interest in the matter, and then some fact or facts that would be good ground for requiring a bond. These facts would be: (1) that the trustee's financial circumstances are such that they do not afford sufficient security for the beneficiaries, or (2) that he is not a resident of the state. In such case the trustee must qualify by furnishing an adequate bond. In one such case, the proposed trustee showed that he was worth $100,000 in excess of his liabilities, and the petition for bond was denied.[5]

When the judge of probate appoints a trustee to fill a vacancy, he may properly require security before acting. By a late New York statute an executor who is also a trustee shall, before taking the property over, file bond unless excused from bond by the will.

A testamentary trustee is required to take an official oath before some officer authorized to administer oaths to the effect that he will faithfully and honestly discharge the duties of his office, which will be described in the affidavit. This affidavit is filed with the court of probate before the trustee is permitted to act.

In New York the statute[6] provides:

> A testamentary trustee named in a will or appointed by the surrogate shall, before exercising the duties of his office, qualify by taking and filing with the surrogate an oath of office and such bond as may be required by the surrogate.
>
> A trust company or other trustee exempted by law from taking an oath of office and filing a bond, shall file a consent to accept such appointment duly executed and acknowledged.

§ 175. Resignation or Removal of Trustees

Strictly, a trustee cannot resign, but he may be removed for some failure of duty or breach of trust. This has in some states been changed by statute. In these states, when the trust

[5] Matter of Weil, 49 App. Div. (N. Y.) 52.
[6] N. Y. Code Civ. Proc., § 2637.

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fund is intact a trustee whose accounts are straight can resign for good reason, such as ill health, old age, or absence from the country. It would be necessary to investigate the procedure in the particular state in regard to this matter.

The probate courts generally have power to remove a trustee who is incompetent, dishonest, or delinquent in any matter pertaining to his trust. The statutes usually give the judge of probate somewhat autocratic powers in these matters.

If the conduct of a trustee is objectionable, the matter may be brought to the attention of the probate judge by petition of anyone affected in interest, and after citation the judge will, on due investigation and if the charges are sustained, make a decree revoking the authority of the trustee. In some situations, the trustee may resign and have his resignation accepted to avoid proceedings for removal and their probable termination.

In New York by statute a trustee may be removed without petition or citation, when he is absent from the state and fails to respond to citation, or evades service of citation, fails to obey the order of the court, has been convicted of a felony, or fails to deposit the trust funds in a separate account as trustee, or when the will is declared invalid.

§ 176. Filling Vacancies

Testamentary trustees are, as the name implies, appointed by will. In cases where one or more of those appointed have died prior to the probate of the will, or where they renounce the appointment, or where a trust is created by will but no trustee is named, or where one or more die or are allowed to resign, or are removed and the trust remains unfulfilled, the probate court has power to fill the vacancy or vacancies. If one trustee of two or more remains, he may, until a successor is appointed to fill the vacancy, act alone in executing the trust.

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In New York the statute gives the court of probate power to fill vacancies arising from: (1) death, (2) insanity, (3) removal, or (4) resignation.

In some states the probate courts have no jurisdiction over trustees, and it is necessary to go to a court of equity for relief in case of difficulty. The same general rules hold in regard to misfeasance or neglect of duty, removal, or filling of vacancies.

When the trustee or trustees have done all that they can do, they should pay over to the beneficiaries or legatees of the life interest what is due, turn in the accounts of their administration, and ask for a decree confirming the administration of the trust. All parties in interest should then be cited, and if the accounts are in proper shape and the trust has been fulfilled, the judge will make a decree that will declare the account judicially settled. Such a decree has all the effect of a judgment in any other court, and relieves the trustee from all claim or demand from the beneficiaries of the trust or from those to whom he may have transferred the trust property.

Review Questions

1. What is a testamentary trustee? What is meant by a "trust"? What is a *cestui que trust*? What is a legal ownership? What is an equitable estate? What are the parties to a trust?
2. Who may be a trustee? What qualifications are essential? Why are financial corporations desirable as trustees?
3. How would you distinguish between a testamentary trustee and an executor? Would the expression of a wish create a trust? How would you use words in a will to create a trust? How do the duties of an executor differ from those of a trustee?
4. How may a testator directly appoint executors or trustees? How may he do the same thing indirectly? In what sense is every executor and administrator a trustee? May trustees act alone?

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5. Is a testamentary trustee required to give bond? What facts would cause a court to require a bond? What oath should be taken by a testamentary trustee?
6. In your state, may a trustee resign? For what cause may a trustee be removed? When may a trustee be removed without a hearing?
7. In case of a vacancy or of the refusal of a trustee to act, what may be done? If in any state the probate court cannot act in any matter relating to trustees, what recourse have those in trouble?
8. May a trustee resign? How is a trust ended? If a trustee merely paid over all he held in trust to the proper party or parties and took a receipt, would he have any trouble?

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CHAPTER XXII

DUTIES OF TESTAMENTARY TRUSTEES

§ 177. Care of Funds

The general rules as to the care of trust funds are the same for all classes of trustees (see Chapter XII, "Caring for Estate Funds"). Any money not invested or money awaiting investment should be deposited by the trustee in a reputable bank, under his name as trustee. If the amount is too small for investment, it may be deposited in a savings bank. If the creator of the trust has directed the disposition of funds, it is the duty of the trustee to follow these instructions. Generally, money is not to be left idle or at a low rate of interest when a higher rate could be obtained from safe investments.

§ 178. Rules as to Investments

The general rules given in § 100 of Chapter XII apply to testamentary trustees, except as they may be modified by any instructions in the will or other instrument creating the trust.

In a New York case the court said:

> We concede that under the terms of the will, the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. The trusts of this will are to provide the testators' children with incomes during their lives, and on their deaths the principal is to go to their issue. The very object of the creation of the trust was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty. The range of so-called "legal securities" for the investment of trust funds is so narrow in

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this state that a testator may well be disposed to grant to his executors as trustees greater liberty in placing the funds of the estate. But such discretion in the absence of words in the will giving greater authority would not be held to authorize investment of the fund in new, speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that a trustee is not limited to the one does not authorize him to invest in the other.[1]

Where no specific instructions are given, a trustee would be limited to the safe investments prescribed by the law for fiduciaries.

In Massachusetts, the rules as to investments are not so strict, but trustees are nevertheless held to sound discretion and good faith. In a Massachusetts case the court said:

A prudent man possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking. A trustee, whose duty it is to keep the trust fund safely invested in productive property, ought not to hazard the safety of the property under any temptation to make extraordinary profits. Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend paying stocks and interest bearing bonds of private business corporations, when the corporations have acquired by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments.[2]

[1] Matter of Hall, 164 N. Y. 196, 199.
[2] Goodwin v. Mass. Loan, etc., Co., 152 Mass. 184, 187.

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Even where testators relieve trustees from these limitations, they are held to exercise reasonable prudence.

§ 179. The Management of Property

Where a trustee holds property other than funds and securities, his responsibilities are extended. It happens many times that real property is held by trustees, to apply the income to the support of a widow or minor children, and when her death or the coming of age of the minors terminates the trust, the property is to be sold and the proceeds divided or otherwise turned over intact to some devisee.

In such cases the trustees are to obtain the best returns that can properly be had from the property, to deduct from the proceeds the amounts needed for taxes, insurance, and repairs, together with such commission as would come to them as trustees, and then to pay over to the beneficiaries the net proceeds.

There is no special difficulty in the ordinary care and management of real property, but at times unusual taxes may be levied for street improvements or the like, which tend to permanent increase in the value of the property. In such a case the cost should be paid out of the trust property, if both the present beneficiary and the remainderman benefit. If the effect of the improvement is not likely to continue beyond the time of the beneficiary, the costs should all be borne by him and none by the remainderman.

In case of a fire the insurance paid should go into the estate and would be held by the trustee in the same trust as the property that was destroyed.

In case stock dividends are received, the rule in Massachusetts is that they are principal and go to the remainderman. The United States courts have decided likewise.

> To hold the plaintiff to be entitled to the whole of the new shares issued to the defendant would be to allow the

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plaintiff the exclusive benefit of earnings, the greater part of which had accrued and had been invested by the company as capital before her interest began, and would be contrary to all the authorities. To award her a proportion of those shares based upon an account of how much of those earnings actually accrued after the death of the testatrix, would be to substitute the estimate of the court for the discretion of the corporation lawfully exercised through its directors, and would be open to the practical inconveniences already stated.

The resolution is clearly an apportionment of the new shares as representing capital, and not a distribution or division of income. As well observed by Mr. Justice James, delivering the opinion of the court below: "Certificates of stock are simply the representative of interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares, this trustee held precisely the same interest in this increased plant in the capital of the corporation, that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave a new evidence of ownership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que trust*. She stood after the issue of the new shares just as she had stood before; and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que trust*." [3]

In Pennsylvania the rule is the same unless the earnings capitalized were earned after the testator's death.[4] In New York and New Jersey, it is sought to find out what part of the stock dividend was really capital and how much came from earnings. In all of the states, if the intent of the trust instrument is clear, it will prevail.

[3] Gibbons v. Mahon, 136 U. S. 549, 569.
[4] Smith's Estate, 140 Pa. St. 344.

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§ 180. Relations to Beneficiaries

Apart from the strictly legal requirements, a trustee should cultivate open and friendly relations with the beneficiaries of the trust. So far as possible, the beneficiaries should understand the exact obligations of the trustee and also the limitations under which he works.

Statements should be typewritten, and where women and others unused to business are the beneficiaries, it is always well to make sure that they understand the statements made. Lawyers, bankers, and business men rarely realize how little business and technical information is possessed by the average man or woman outside of business or professional life. To avoid the appearance of stupidity, such people many times accept or assent to matters that they do not understand, or when these are explained miss the explanation because it is couched in technical language with which they have never had an opportunity to familiarize themselves sufficiently. A little extra pains in making things really clear to beneficiaries will be highly appreciated and tend to preserve a feeling of friendly confidence.

§ 181. Statutory Requirements

The general principles of law governing trustees are the same in all parts of the country, but each state has its own procedure and in some cases the general law is embodied in its statutes. It follows that a trustee should be familiar with the legislation of his own state so far as it affects his duties. Likewise, before creating a trust, the statutory laws should be examined with care, or the maker may attempt some form of trust estate forbidden by the law.

In New York, for instance, in addition to prescribing the broad powers of the surrogates' courts in all matters pertaining to testamentary trustees and detailed procedure in dealing with their accounts, the statute law prescribes qualifications,

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and the causes and procedure for removal of testamentary trustees. Most of these statutes merely declare in positive language what the courts have decided was law.

§ 182. Carrying on a Business

It is not usual for a trustee to carry on a business of the estate. He should not do so unless specifically directed by the instrument that created the trust. At times he may have to close up and dispose of the proceeds of a going business, and in such case his duty would be to do so to the best advantage and with the least delay. If closing up involves the conduct of the business for any time, the executor or the trustee should secure an order of the court, or, if the beneficiaries can consent (are of legal age), should have the consent of all interested. The five conditions under which a trustee is not liable for loss in running a business are:

1. Where consent has been given by all interested.
2. Where the business has been carried on by direction of the court.[5]
3. Where explicit and personal directions have been given in the will.
4. Where directions have been given in the articles of partnership.
5. Where statutes in some of the southern states permit closing up of farming operations.

A trustee who conducts a business without authority from the will, an order of court, or consent of all interested, is seeking trouble for himself and will usually succeed in his search.[6]

§ 183. Keeping Accounts

It is of the highest importance that a trustee should keep full and accurate records of all his transactions with trust

[5] Schouler, Wills, Executors and Administrators, Vol. I, p. 432.
[6] Matter of Peck, 79 App. Div. (N. Y.) 296.

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funds and property: (1) because he must know exactly what income he is making in order to know what amount to pay the beneficiaries from time to time; and (2), in order that he may be able to make statements of his trusteeship that will satisfy the court and enable him to get a decree of final settlement that will discharge him from all liability.

In New York, by statute, a testamentary trustee may file at any time a voluntary intermediate account, or he may by order of court have to file a compulsory intermediate account. In such case those interested are cited to attend and the account will be examined and, if correct, will be judicially settled. In like manner a trustee may file a final accounting or may be compelled to do so.

§ 184. Compensation

At common law a trustee received no compensation. In most of the states this has been remedied by statute. In New York, executors who afterwards become trustees are allowed double compensation if the trust is separable from the executorship. In many cases an executor is given duties that are those of a trustee, but there is no line of practicable separation. The man who writes a will should himself distinguish between the duties of an executor and those of a trustee, and when he desires a trust extending over a term of years, he should separate the trust from the more simple functions of the executor and should provide for ample compensation for the trustee or trustees.[7]

Executors may often arrange this themselves by making their final accounting as executors, and when this is approved, securing an order from the court directing that the trust funds or property be turned over to them as trustees to carry out the purposes of the trust.

If a trust company is to be trustee, it would probably de-

[7] Robertson v. De Beulatour, 188 N. Y. 301.

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cline to act if the trust involved work and liability with no compensation.

It has been stated that neither an executor nor a trustee has any authority to carry on a business unless explicitly authorized to do so. If it is desired to continue a business owned by the testator, the person who is to run that business should have an adequate compensation specified in the will. If no compensation is so specified, the trustee will receive nothing but his limited percentage on the original investment and the same percentage on all profits he may pay over to the beneficiaries. The courts do not favor the conduct of a business by trustees or executors. If an executor continues a business on his own responsibility he is liable for any loss, must pay over any gains, and can in no event make any profit for himself.

The courts rarely allow any extra compensation above the statutory amount. If the testator imposes extra and unusual duties upon his executors or trustees, he should see that in some way they are paid for what they do.

Under the wording of the New York statute, which gives trustees a commission on "receiving and paying out all sums of principal," the court awards one-half of the commission on receipt of the trust funds.

As the matter is regulated by statute, it would be necessary to consult in such matters the state laws and decisions.

Review Questions

1. What are the general rules as to the care of trust funds in your state?
2. What are the general rules as to trust investments?
3. What are the general rules for the care of real estate held in trust? What is the rule as to assessments for improvements that increase the permanent value of the property? If a build-

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ing were burned, how should the insurance be applied? What is the rule in your state as to stock dividends? In case of an income from stocks to be paid a widow and at her death the principal of the stocks to be given to a nephew of the testator, what should the trustee do with a stock dividend of 50 per cent?

4. What should be the relations of the trustee and the beneficiary? Are men and women generally familiar with legal and financial matters?
5. May a trustee conduct a going business? If he is compelled for a time to carry on a business, how may he protect himself? In what cases is a trustee justified in conducting a business?
6. Why should a trustee keep accurate and full records? What accounts must be filed by a testamentary trustee?
7. In your state, what compensation do trustees receive? How should the functions of a trustee be set off from the duties of an executor? Will a trustee be compensated for running a business?

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CHAPTER XXIII

EMPLOYMENT OF COUNSEL

§ 185. The Usual Course

A man who makes a will usually employs a lawyer to draw it up. In many cases he leaves the executed instrument in the keeping of the lawyer. Then, upon the death of the testator, the lawyer turns over the will to the executor named in the will for presentation for probate. Under such circumstances it would be natural that the executor employ the testator's lawyer, who was familiar with his affairs, his property, and business relations, rather than another. Also, if there were more than one executor, it would be simpler to employ the testator's lawyer than to choose between the counsels of the executors. Sometimes a testator names his own lawyer as executor or as one of the executors.

It is to be remembered, though, that an executor assumes responsibility for the estate. Important questions will come up for decision, and he will require for his own safety advice upon which he can rely. Hence, he is always entirely free to select his own counsel, and should do so, unless he feels as much confidence in the testator's selection as in his own. The old family lawyer might well look after the interests of the family, if it made them feel safer, but he should be employed by the family and paid by the family. An executor might prefer the advice of independent counsel as to his duty in the process of settlement.

The reasonable amount paid for such advice is always a proper charge against the estate, and the executor or the trustee may credit himself with the amounts so expended. These

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amounts will then appear on the accounting, may be objected to by any party interested, and will be allowed or disallowed by the judge of probate. When the judge is himself a lawyer, he is not likely to disallow any fair fee.

§ 186. The Executor's Counsel

It is to be remembered that the executor has a free hand in engaging counsel. Even when the testator directed that that particular counsel should be engaged for the probate of his will and all other matters in which the executor required counsel, it was held by the court to be merely the expression of a wish, and the law does not recognize any power in a testator to control executors in their selection of attorneys. If there is any error made in the settling of an estate the executor is personally responsible, and therefore should be free to select his own advisers. Another consideration is that in employing counsel he is not acting as the agent of the estate, but acts independently for himself and is responsible for the fees of whatever counsel he employs. If, on accounting, such fees are adjudged reasonable and such legal services necessary for the proper conduct of the settlement of the estate, the amount will be allowed and the executor will be reimbursed. Primarily, though, the executor is personally liable, and if such counsel's fees are unpaid the lawyer must bring suit against the executor or the administrator and not against the estate.

§ 187. Rules as to Employment of Counsel

In a recent case a New York surrogate laid down the following rules for the guidance of executors and administrators in employing counsel:

> An executor should not in an ordinary formal account, involving no intricate question, employ eminent and expensive counsel and pay them extravagant fees. If the services beyond an ordinary trial or account were such that they

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could very well have been rendered by an attorney of average learning and ability, he cannot pay him large fees and be reimbursed therefor. On the other hand, if the estate is large and the question at issue important, the accounting party is not limited to the employment of counsel, whose services may be obtained for a fee of ten dollars a day.[1] He may engage counsel equipped by learning and experience to conduct litigations of magnitude, and recompense him with a fee corresponding to his services and the interests at stake. In the case at bar, a considerable portion of the services included in the voucher and testified to in greater detail on the trial were rendered strictly in the administration of the trust, and there can be no doubt whatever that they are allowable, unless the sums paid were excessive. Of this class (allowable services) were the consultations as to his conduct prior to the account, the transmission of funds abroad, the McCabe mortgage and the tax matter. The proof as to services rendered is not as detailed as I would like in order to pass upon the propriety of the charge made, and I am compelled to some extent, to rely upon my own experience as to what labor must have been entailed by the proper conduct of the litigation. I believe, however, that a fee of fifteen hundred dollars in addition to the full amount of disbursements claimed, is sufficient recompense for the services shown to have been performed.[2]

§ 188. Trust Companies and Counsel

When a bank or a trust company acts as executor or trustee, it will in some cases employ counsel suggested by the testator, reserving always its discretion to employ counsel of its own selection, in case it should seem desirable to do so. This would mean the employment of the counsel suggested for all the routine procedure, but for any special points coming up which might involve the trustee in liability to beneficiaries or to those who are to take the property when the trust expires, the

[1] Ten dollars a day was the statutory fee allowed in New York for counsel employed to assist in preparing an account. It was an obsolete regulation even before the present high cost of living.

[2] Matter of Smith, 2 Connolly (N. Y.) 418, 431.

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trustee would naturally desire to be guided by the advice of its own attorneys, who naturally would be most interested in guarding the trustee from liability. There is always a possibility that some action taken by the trust company may not be approved by some beneficiary, and in such a case the company would want the independent advice of their own lawyer, rather than that of one whose sympathies might well be with some of the beneficiaries.

§ 189. In Event of Litigation

In event of litigation affecting the estate, it would be the duty of the executor to engage counsel who could adequately represent the interests of the estate. If the probate of the will was contested, the executor should be represented by lawyers able to meet the opposing counsel.

> In a contest relating to the validity of a will, as this was, the person by it appointed executor is bound, on every principle of honor, justice and right, to defend it. He owes this, at least, to the memory of the dead who placed this confidence in him. This will had been duly proved without opposition, and in the proper court, and the executor was bound to carry out its commands or renounce. To do otherwise would be a gross dereliction of duty. This being so, to make him personally liable for all the costs, in case the contestants succeed, would be monstrous injustice.[8]

If the estate had claims against others that it was necessary to enforce by suit, it would be the duty of the executor to employ counsel adequate for the purpose. An executor is to act in all respects as a prudent man of affairs would act in the transaction of his own business and the care of his own property. If the estate were large and the litigation important, he would want counsel of ability and repute. If the matter were merely a suit on a promissory note of small amount, he would give it to some young lawyer, or if the

[8] Pingree *et al* v. Jones, 80 Ill. 177, 181.

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executor were employing an eminent firm, they would turn it over to a junior or a clerk in their office and possibly make a proportionately smaller charge.

§ 190. The Lawyer's Fees

The executor has the right, and in the proper place it is his duty, to employ counsel, and he primarily pays their fees. If it was a proper case for the employment of counsel, the representative will be reimbursed. It is assumed that the fees so paid by the executor will be reasonable under all the circumstances. They are approved or rejected by the probate judge, and usually he is disposed to allow his brother of the bar "a living wage." At the same time, members of the bar have been known to charge more in such cases than they would otherwise, and on objection of any of the legatees, such charges may be rejected.

In a New York case the surrogate said:

> I am convinced that the professional services that were rendered were characterized by skill and ability. The attorneys consumed much time in the performance of their duties, and their efforts were generally successful. If only a question of the character of the services were before me, I should say that they were probably worth the amount that was paid by the estate. But it seems to me that, when the question of compensation of an attorney is presented to this court, the ability of counsel and his success in litigation are not the only elements to be considered. The size of the estate must necessarily play an important part. The amount involved in a civil action is properly taken in consideration in determining the value of a lawyer's services (Rand v. Packard, 142 N. Y. 47, 56; People v. Bond St. Sav. Bank, 10 Abb. N. C. 15), and this test is peculiarly applicable in this court, whose duty it is to conserve estates and see that the persons interested therein obtain their just dues. The estate herein was a small one, amounting to about $8,000 and the fees paid to the attorneys of the executor amount to about one-half of

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> this sum. In view of all the attendant circumstances, I am of the opinion that, in spite of the arduous services rendered, the sums charged were excessive. If attorneys, who receive large fees for their time and labor, care to engage in the litigation of a small estate, they must be satisfied with correspondingly small remuneration. The amounts paid to the attorneys of the accountant, which are objected to, will only be allowed to the extent of one-half.[4]

A number of factors enter into the making of a charge for legal services:

1. The amount involved. A lawyer would expect to be paid more for collecting a note for $50,000 than for a note of $500, although the time, labor, and skill involved were the same in each case.

2. The intricacy and difficulty of the case and the degree of skill required. Beginning suit on a promissory note is a simple matter and a law clerk or a lawyer just admitted could do it as well as a Root or a Choate. To break a will is usually an exceedingly difficult matter and requires skill and experience, forcefulness, and intellectual ability, in no small measure.

3. The actual time and labor involved. Many lawyers base their bills on the time spent in consultation, research, and attendance at court, charging perhaps a higher rate for time engaged in trial or public hearing than for office time.

4. The repute and position of the lawyer. In every community there are certain lawyers who have won their spurs and whose advocacy is more valuable on that account. An executor would not be justified in retaining such a lawyer for a simple, straightforward probate of a small estate. On the other hand, he would be remiss if he did not engage such a man if the estate were large and the issue uncertain

5. Finally, the fee charged will be affected by the fact of success or non-success. A lawyer who has recovered a hand-

[4] Matter of Jones, 28 Misc. (N. Y.) 599.

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some amount by suit or has successfully fought off a claim for heavy damages, can and will charge more than he would if he had deserved as much and had done as much, but had lost his case.

§ 191. The Lawyer as Executor

In many cases lawyers are made executors. In New York, if a lawyer acts as executor, he may be paid a reasonable attorney's fee in addition to his commissions as executor. Where a man has a lawyer who is his friend as well as his business counsellor, and who knows all about his property and his problems, such a man could more satisfactorily serve as executor than could anyone else. In such a case, the testator should find out what the legal commissions for settling the estate would amount to, and if these are not enough should leave his executor a liberal legacy by way of compensation for what he is asking him to do. In a well-arranged estate, with a carefully considered will, comparatively little money need ever pass through the executor's hands, and the legal fees would be inadequate compensation for the work and responsibility. In such case, a legacy of greater value to compensate the executor would be a wise and generous measure.

In selecting an executor from among friends, it is to be remembered that if they are men of the same generation as the testator they may die first, or may die during the administration of the estate. In this respect, executorship by a trust company has its great advantage.

§ 192. The Work of the Family Lawyer

Apart from the function of the advocate, the lawyer's work may be heaviest in connection with the disposition and care of property. Families that have property have to have family lawyers, and this work, while not exciting, is interesting and brings the counsellor into close touch with human lives, human motives, and human experiences. The work of

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settling estates and the care or guardianship of minors and looking after the interests of single women, demands from the counsellor much care and much sympathy and patience for human frailties and foolishness. This sort of work will bring the lawyer into close touch with many lives. Many strange stories will come to his ears, which he can never repeat but which make him feel that he can do good in the world, and that with his brethren, of the clerical and medical professions, he can help to make lighter the loads of weary human beings. As he grows older and after he has been in the community longer, he will be appointed executor of estates, guardian of minors, trustee of funds, and to other responsible work that comes to those in whom the community can trust. Much of this is not very remunerative work or very thrilling, but it has its charm for one who loves his fellow man and who cares for the lives of those about him.[8]

Review Questions

1. What is the argument for employing the testator's lawyer? What is the objection? Who decides?
2. Why is the executor free to employ whom he will? Who pays the lawyer's fees?
3. When may the executor employ high-priced counsel?
4. Why would a trust company always reserve the right to employ its own counsel?
5. What would be the duty of the executor in event of litigation?
6. Who decides whether or not the executor shall be reimbursed for what he pays lawyers? Generally, what factors enter into a lawyer's fees?
7. Why does a lawyer make a desirable executor? How may a testator increase the compensation of his executor?
8. How does the work of the family lawyer differ from the work of the trial lawyer?

[8] Conyngton, Business Law.

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CHAPTER XXIV

COMPENSATION OF THOSE WHO SETTLE ESTATES

§ 193. Introduction

The customs and statutes of each state and jurisdiction differ on compensation, and the best information can be acquired only by examining the codes and records of the particular state in which you are interested.

In taking up the subject here, the statutes of some of the more prominent states have been examined as giving as nearly as may be a general idea of this subject.

Attorneys' fees have been discussed in § 190, but it is well to note here also that the law usually sets no limit on attorneys' fees, and that the attorney and his client are expected to come to a satisfactory agreement between themselves. When fees are to be paid by the estate, the court must approve the amount later.

Back in the earlier days, when statutes on this question had not yet been passed and the common law was still in force, the office of executor and administrator was honorary and had no remuneration attached to it. In the United States and Canada, this is not now the case, and for the most part the states have passed regulations concerning this question of compensation, and where a definite amount or percentage is not fixed by statute, the representative is entitled to a reasonable amount for his services.[1] This reasonable amount is, for the most part, based on the amounts fixed by statute in other states.

[1] Main's Appeal, 73 Conn. 638.

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§ 194. Compensation of Personal Representatives

The amount of compensation allowed a personal representative does not depend upon the law in force at the time of the settlement of the account or at the time of appointment, but depends upon the law of the state in force at the time that he rendered the services for which he is claiming compensation. Where a representative delivers into the hands of the court which issued him letters, funds which have been collected from debts owed the decedent's estate in another jurisdiction, his compensation or commission will be regulated in this instance by the law of his own jurisdiction.

Even though the appointment of a representative was irregular in some way, he is entitled to compensation for services rendered faithfully and well until the court discovers its error. A representative may withhold from creditors a sufficient sum to cover the commissions he has earned in paying other claims and collecting debts. Although he may not actually take this amount, he may hold it as a separate fund until it is awarded to him by the court as lawful commissions.

Executors' and administrators' fees are preferred claims and must be paid along with those of funeral expenses and the allowance for the family pending settlement. (See § 110.)

Where a statutory compensation has not been prescribed for all services which may be rendered by a representative, or where the common law is still in force, representatives are entitled to a reasonable compensation for all services which were necessary to settle the estate, and for the benefit of the estate; but they may not receive compensation for services which were not properly a part of their work, or for services not connected with the settling of the estate, or for their own benefit.

§ 195. Compensation Fixed by Testator

A testator has the right to and may fix the amount of compensation to be received by his executor. If, under such cir-

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cumstances, the proposed executor knowingly accepts the appointment to office, he may not collect more than the sum fixed by the testator. If, however, some unusual acts or duties were imposed upon the executor while in office, he may be allowed a commission or separate amount apart from that fixed by the decedent. In a Pennsylvania case, the testator directed as follows: "To each of the executors of this my last will and testament, I bequeath the sum of one thousand dollars, as and for compensation for their services as such executors." The estate was of such a size that commissions at 3 per cent would have amounted to nearly $18,000, and the court held that the two executors were entitled to only $1,000 each.[2]

In a Maryland case it has even been held that a testator may deprive his executor of all compensation for his work. If, however, this were the general rule, few people would be likely to accept an executorship under such terms.

Where the compensation fixed by the testator is less than that fixed by statute, California, Louisiana, New York, and one or two other states, allow the executor to take his choice.

§ 196. Commissions Fixed by Statute

In most jurisdictions, executors and administrators are allowed commissions on the value of the assets which pass through their hands during the period of settlement. These commissions apply to all property for which the representative is responsible, and are given in consideration of the risk and trouble undertaken by the representative in performing his duties. Commissions are allowed the representative for paying legacies and debts.

Where a debtor is himself the representative, and he faithfully pays such debt into the funds of the estate, he is entitled to one-half the ordinary commission allowed because of the responsibility of handling and disposing of such debt.

[2] Haye's Estate, 183 Pa. St. 296.

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A representative may waive commissions if he so desires. If he has made any statement concerning such waiver while pending appointment by the court, he may retract it before letters are actually issued to him. No promise made on his part upon the subject of a commission is binding without consideration. If, however, he makes payments to creditors and otherwise pays out money, without deducting any amount afterwards to be awarded to him as a commission, it is treated as a gift of the commission to the estate, and therefore needs no consideration.

Amount of Compensation. This particular part of the subject of compensation demands study of the codes or statutes of each state, but in treating of the matter here, it has been the object to set forth the average amount allowed in the majority of the states. The rate of compensation in New York runs about as follows:

5 per cent on amounts up to $2,000
2½ per cent on additional $20,000
1½ per cent on additional $28,000
2 per cent on all further amounts

If there is more than one representative, and the estate amounts to more than $100,000, each representative is allowed the full percentage of compensation. If there are more than three representatives, the compensation to which three representatives would be entitled must be divided among the greater number according to the services rendered by the representatives.

In general, it may be said that commissions allowed range from 5 to 10 per cent for smaller estates, to from 5 to 1 per cent for larger estates. The statutes or usages in the particular state should be consulted.

Forfeiture of Compensation. Compensation or commissions will not be due where the duties of the representative have not been faithfully or carefully performed.

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Conduct of this sort, however, is cause for removal from office, and therefore no compensation would be due for services of such a character or for services performed after removal.

Representatives who are removed or who resign are entitled only to a sum commensurate with the services they have performed which were proper or beneficial to the estate.

§ 197. Compensation for Counsel

As stated in the first part of this chapter, the attorney's fee is a matter of mutual agreement between the attorney and his client. A personal representative must pay his lawyer for services in connection with the estate, but may later ask that he be reimbursed for any reasonable outlay. (See §§ 186, 187.)

In some states it is held that an attorney who has performed any services for his client for which the client asked, has a lien on his client's cause of action, which will attach to any verdict or judgment in favor of his client. This lien will not be affected by any settlement betwen the contesting parties whether made before or after judgment, and the court will aid an attorney in enforcing a legal claim of this kind against his client. If a lawyer recovered funds for an estate, he would be entitled to his lien.

Any attorney who has an infant as client, will have his charges reviewed by the court in regard to the amount and as to whether they are a reasonable fee for the services which he has performed.

Review Questions

1. Where no compensation for an executor is fixed by statute, what is done?
2. What law regulates the commission paid personal representatives?

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May a representative pay himself his lawful commissions? If a representative renders extra services, are such services entitled to compensation? How would the amount be determined?

3. May a testator fix the compensation of an executor? How would this be done? May an executor agree with any of the beneficiaries for extra services? If the compensation fixed by a testator were too small, what could the executor do?

4. What is the usual method of fixing compensation for settling an estate? If an executor owed the estate money, would he be entitled to his commission when he paid it? If a representative pays over money and fails to retain his commission, what is the effect? In your state what is the legal commission for settling an estate? If there were three executors, how would commissions be apportioned? If an executor fails in his duty, what effect will it have on his compensation?

5. May an executor employ a lawyer for the estate? What may he do? If a lawyer collects a claim for the estate, will he be entitled to his lien on the amount?

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CHAPTER XXV

ACCOUNTING

§ 198. Objects of Accounting

The word "accounting," in connection with the duties of executors, administrators, guardians, and testamentary trustees, has a twofold sense. It means not only the process of keeping an orderly written record of all the financial transactions concerning the trust property, but more specifically the rendering of an intermediate or a final statement in due form, giving the details and results as shown by such records.

The purpose of such statements is: first, to furnish a permanent, condensed record for the information of the court, the legatees, and the creditors of the testator; and, second, to ascertain the amount due from the trustee or representative.

The accounts of all trustees should show the amounts received and from what sources; the amounts paid out, to whom and for what purposes; and the difference between these sums which would be the amount for which the trustee would be responsible.

§ 199. Form of Records

There is no arbitrary form prescribed for the books, and the records may be as simple as possible. A single entry record may be sufficient if all cash is passed into the bank account as soon as it is received.

There is usually a form provided by the probate court for the inventory and one for the statement on which is based the "accounting" before the court; but the actual records are left to the discretion of the trustee or representative. The inven-

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tory would be the necessary preliminary to any bookkeeping, as it gives the opening entries and the *prima facie* values, and it would be difficult to keep books without such information for a foundation. In all states where inheritance taxes are assessed, an accurate, detailed inventory is required for that purpose and the appraisal must be by sworn appraisers. For all personal assets, as shown by the inventory, goods, cash and claims, the representative must charge himself. He takes them into his possession and is responsible for them.

The books of account must therefore:

1. Show what things came into possession.
2. Distinguish between cash and other assets and claims.
3. Record the payments made and their purpose.

When the final transfers and payments have been made, the estate has been settled and the representative's work is done.

In the case of a testamentary trustee, he must charge himself with the property both real and personal, placed with him in trust. His books as trustee must show his dealings with the property and with the beneficiary. His record may extend over a long term of years, and problems of some difficulty at times arise. A trustee's records must discriminate between principal and income. The principal is to be preserved intact for the ultimate beneficiary or "remainderman" as he is called. (See on this subject Chapter XXXV, "Corpus and Income.") The income is disbursed as it accumulates to the immediate beneficiary or *cestui que trust*. Questions come up when the rights of beneficiaries and remaindermen conflict, and it is not always easy to decide such matters and to record them with accuracy. Where the same person or persons are first executors and later testamentary trustees, the difference in function demands separate books in order that the transactions may be clearly distinguished.

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§ 200. The Probate Court's Supervision

If an executor or other fiduciary neglects to keep adequate records, this fact will appear as soon as he is required to account. If his records are incomplete or faulty, the statement will be defective and it will be called in question. At any "intermediate accounting" anyone interested may file objections to the insufficiency or inaccuracy of the statement; and even if no one does this the judge of the probate court may compel the representative to undergo an examination and to submit an intermediate account that is satisfactory. Surrogate Ransom, of New York, has summed up the power of the probate court as follows:

> The account should state if an inventory has been filed, and, if none has been filed, the account itself should furnish the information usually thus supplied. It should likewise state whether or not advertisements for claims have been published, what claims have been presented, what allowed, and what rejected; and the time and manner in which they were rejected or disputed, and the reason therefor. Also, what claims have been presented and allowed since the expiration of the publication of the advertisement for claims. The accountant should then proceed to credit himself with funeral charges and expenses of administration, with moneys paid to creditors (naming them) and payments to legatees or next of kin. He should state the age of legatees or next of kin, if any are minors and whether they have guardians, and, if so, their names and places of residence, and how appointed. If there is any other fact which has occurred, as part of his proceedings, which may affect the estate or the rights of any distributee, or his own rights, he is bound to state it. He must not only state in what character his payments were made, as charges or of administration, distinctly, but he must produce vouchers supporting each payment; or in cases of claims under $20,00, where no voucher is produced, he must make and present, in lieu of voucher, his own oath positively to the fact of payment, when made and to whom. Unless the order of the Surrogate requiring an

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executor or administrator to render an account of his proceedings, is obeyed in this manner, as plainly indicated by the statute, he will not have made the proper response to the order.[1]

The foregoing refers to an intermediate accounting. The court would have much more power to compel a satisfactory final accounting. If the representative had not kept adequate records and it would be impossible for him to prepare a satisfactory accounting, he and his bondsmen would be liable in damages for any loss caused by his default, and it would be sufficient cause for his removal by the court.

The decree of distribution may be rendered on the day on which the accounting is presented to the court if the executor has secured from all interested persons signed approvals of the account and waivers of their rights to be notified of its presentation. When such approvals and waivers are not secured, the length of time after the presentation of the account before the decree of distribution can be rendered varies in the several states.

§ 201. Settlement out of Court

In some cases settlements to the satisfaction of all concerned are made out of court. If one person were made executor and residuary legatee, and he paid all taxes and all outstanding claims, and satisfied all legatees, he would then be the only one left who was concerned with the estate. No one would be interested in calling for a final accounting, and the probate judge and the court officials would not be likely to stir the matter up on their own account.

When a man leaves all that he has to his wife and appoints her executrix, this is likely to happen. If a lawyer is employed, he will probably, for the sake of clean work and to

[1] Matter of Dwight, 9 N. Y. Supp. 927, 928.

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earn his fee, see that final accounting is had and that the account is approved and the executrix discharged.

§ 202. Settlement in Court

The object of settlement in court is to give all concerned in the settlement of the estate an opportunity to examine the different transactions, ask explanations of what is obscure, and object to any errors, mistakes, or omissions. To make this accounting effective for the protection and discharge of the executor, all persons interested must be legally notified. If there is any failure in the matter of notice, the party affected may come in at some later time and call on the representative for a further accounting. Also, if the representative omits any matter, he can be called upon later to account for it. As to all matters set forth in the account and as to all persons legally notified, the accounting is final. (See § 203.)

The executor may voluntarily, at any time after the period fixed for administration has expired, ask that a time be set and that those concerned be duly notified, or, if he is not prompt to account voluntarily, he may be called to account by any creditor or legatee who has not been paid.

§ 203. Conclusiveness of Final Settlement

If the assets of the estate have all been accounted for and the creditors have all been paid, the distribution of any remainder will be ordered by the court. If all legatees have been paid in full, what is left will go to the residuary legatee. If proportionate part payments have been made to all legatees, and there was not sufficient remaining to pay them in full, the court would direct a proportional distribution of such remainder. If it was to be paid to a trustee, the court would direct such payment.

The representative should then make such distribution as the court orders, and should return his vouchers showing that

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he had complied with the court orders. He should then pay out the remainder as directed, present his vouchers to the court, and ask that his bond be canceled and that he be discharged in such form as the local usage takes.

The whole subject of accounting is taken up in detail in Part VI of this work.

Review Questions

1. In what two connections is the word "accounting" used? For what purpose is a record kept? What is the object of the accounting?
2. Is any form prescribed in which accounts are to be kept? Have you a copy of the inventory form used in your own court? What two matters must the books show? How would a trustee's records differ from those of an executor? If a person is first executor and then testamentary trustee, what should he do about keeping accounts?
3. What authority has a probate judge over the statements rendered by a representative? What should a comprehensive accounting show? What should be given as proof of all small claims? What would be the penalty where the representative failed to render intelligible statements?
4. When can an estate be safely settled out of court?
5. What is the object of a settlement in court? What is the general procedure at such a settlement?
6. If the final accounting is satisfactory, what would the court order? What is done then?

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PART III

TAXES

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CHAPTER XXVI

PAYING TAXES DUE

§ 204. Taxes Due a Preferred Claim

As has been stated (see § 111), all taxes due by the deceased at the time of his death are to be preferred in payment over all other claims, excepting only the expenses of the funeral and of administration. Any indebtedness to the United States or to the state for any cause other than taxes enjoys the same priority over other debts. Such indebtedness is not usual, but might arise, for example, from some liability of the decedent as surety on a bond.

As between taxes due the United States and taxes due the separate states, the federal obligation is preferred. All taxes due at the time of death, whether on real or personal property or merely against the person, are to be paid at once after the expenses of the last illness and the funeral and of administration are paid and without regard to other claims.

The funeral expenses to be preferred must be reasonable. (See § 110.) In most of the United States the expenses of the last illness would be allowed, though these, being debts arising before death, would be on a different footing than the funeral expenses.

The estate must be administered, and therefore the expenses of administration are preferred to taxes. In each state the local law should be consulted.

§ 205. Taxes on Personalty

At a certain date the decedent became liable for his annual taxes. If the date of assessment came before his death, the

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amount of such taxes would be a preferred claim. If this date came after his death, the taxes are merely an expense of administration to be paid by the executor or the administrator of his own accord. For this payment he would have credit at any accounting. The taxes would not in any such cases be a preferred claim if the estate was solvent, and it would not require any action by the court to authorize payment. After distribution the new owners would pay, and the personal representative would have no responsibility.

In some cases there might be trouble as to where taxes should be paid. If the executor or the administrator lived in a county other than the domicile of the decedent, the general rule is that he would pay where he, the representative, lived. In some localities the rule is otherwise.

If tangible property of the decedent is in another state, the ancillary administrator will pay there. In the case of intangible property, as shares of stock, debts owing, etc., a tax may have to be paid in both states.

The fact that a note is kept in another state does not make it taxable there.

§ 206. When Taxes on Realty Are Paid from Personalty

All taxes assessed against real property belonging to the decedent up to the date of death are an obligation of the estate, and are to be paid as a preferred claim by the personal representative and cannot be passed on to the heir or the devisee. The statute in New York specifies "taxes assessed on the property of the deceased, prior to his death." This is held to include all taxes that are debts of the decedent and, if he had lived, could have been collected from his personal property. This is the general rule throughout the United States.

Where, however, a charge for improvements is assessed against realty by a municipality in such shape that it lies as a lien against the land itself and cannot be collected personally

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from the owner of the land, then the executor or the administrator does not pay it, but the heir or the devisee takes the land subject to the charge. Assessments for paving, sewage, and similar charges, that are supposed to add to the value of the land, should not be paid by the executor unless they could have been collected from the personalty of the decedent had he lived, but should be paid by him who takes the land. Such assessments are encumbrances, as is a mortgage. In such cases, the local laws authorizing such levies should be examined.

When the executor is empowered by the will to sell real estate, or when he is obliged to sell real estate to obtain funds to pay debts, it is his duty to insure, repair, and pay taxes on the realty to be sold. Otherwise he has no duty to pay any taxes on real estate that are assessed after the death of the testator.

§ 207. Taxes on Realty Are Not Apportioned

In New York all taxes on real property assessed before death are a charge on the personal estate and are to be paid by the personal representative.

> The representative should . . . pay assessed taxes which became a lien on decedent's real estate before his death . . . but save so far as he may have special authority over the real estate to sell or manage it, or may need it specially to sell for the payment of debts, he is not warranted in paying taxes on it assessed or levied after decedent's death, since these are charges on the land for the heirs or devisees to pay.[1]

The exact time when a tax is assessed is sometimes of great importance in ascertaining whether it should be paid by the personal representative or by the heir or devisee. If that time occurs before death, the personal representative pays it; but if the tax becomes a lien after the death of the testator, the devisee must pay the whole tax. It is not prorated or apportioned; the

[1] 24 C. J. 294.

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tax for the entire year in which the death occurred must be paid by the personal representative, or if he is not liable the whole tax must be paid by the heirs or the devisees. But "heirs and distributees take property of the intestate subject to its liability for taxes." [2]

§ 208. Payment of Income Taxes to Date of Death

Immediately after appointment and qualifying, and without waiting for the close of the taxable year, an executor or administrator must file a federal return of income for the decedent to the date of death, unless the decedent's income for the year or part of year to be covered in the return was less than the $1,000 allowed before a return need be filed.

The period required to be covered by the return is usually from the beginning of the calendar year in which the death occurred, or it may cover a fiscal period beginning on a date other than January 1, if the last return filed by the decedent covered a period other than the calendar year. If the demise occurred after the close of a taxable period for which the decedent had not yet filed his return, it is necessary for the administrator or executor to file a return for that entire period as well as the return for the later fractional period. Forms 1040 (revised) and 1040A (revised) are used for this purpose. In making this return the administrator or executor reports exactly in the manner which the decedent himself would have been required to follow had he lived to make his own return.

> The income tax due from the decedent is a debt against the estate in the hands of the executor or administrator, and the executor or administrator is required to file the return for the decedent in order that the amount due to the government from the decedent's estate may be determined and paid.[3]

The executor or administrator is entitled to claim for the decedent the full personal exemption to which he would have

[2] 18 C. J. 951.
[3] Montgomery, Income Tax Procedure, 1921, p. 1034.

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been entitled if he had lived to the end of the taxable year, no matter how small a portion of the year is covered by the return.[4] Whatever amount of tax is found to be due would be a preferred claim and is entitled to priority in payment.

The state laws covering the payment of income taxes on behalf of deceased persons follow the same general principles as those of the federal law, but vary in detail in all the states having income tax laws. The payment of income taxes on an estate in process of administration or on a trust estate is a more complicated proceeding and will be treated in the two chapters following.

Review Questions

1. What are the preferred claims? How do taxes rank among these?
2. When are taxes on personalty a preferred claim? If taxes on personal property come due after the death of the testator, what is their status? When does double taxation arise?
3. Why are taxes due on realty paid from the personal estate? What exception to this rule is sometimes made? When would a representative pay taxes on realty assessed after the death of the testator?
4. Are taxes due on realty ever apportioned? What decides whether a land tax is paid by the representative or the heir?
5. What is the rule as to the payment of income tax? What is the rule as to exemptions?

[4] Article 305 of Regulations 45, Bureau of Internal Revenue.

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CHAPTER XXVII

FEDERAL INCOME TAXES ON FIDUCIARIES

§ 209. Income Taxes Pending Distribution and Final Return

An executor or an administrator, after having made the return of income to the date of death, must at the end of the decedent's taxable year make a report as a fiduciary if the net income of the estate is $1,000 or over, or if any beneficiary is a non-resident alien. Thereafter, within two and one-half months following the close of each taxable year he is required to make similar returns.

> Upon the completion of the administration of an estate and final accounting an executor or administrator shall file a return of income of the estate for the portion of the taxable year in which the administration was closed, attaching to the return a certified copy of the order for his discharge. An ancillary administrator need make no separate return if the domiciliary administrator includes in his return the entire income of the estate. Similarly, upon the termination of any other trust the trustee shall make a return without waiting for the close of the taxable year. In any such case the requirements with respect to the payment of the tax are the same as if the return were for a full taxable year closing at the end of the month during which the decedent dies or the estate is settled or the trust is terminated, as the case may be. The payment of the tax before the end of the taxable year in such circumstances does not relieve the taxpayer from liability for any additional tax which might subsequently be imposed upon income of the taxable year.[1]

§ 210. The Duties of a Trustee as to Income Taxes

Generally, the duties of a trustee or a guardian as to taxes and tax returns are the same as the duties of any careful busi-

[1] Article 442 of Regulations 45.

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ness man as to his own property. For purposes of the federal income tax, a trustee must report if the net income of the estate exceeds $1,000, or if any beneficiary is a non-resident alien. If there are two trustees it is enough if one of them makes a return.

If the trustee is acting for an individual, as in the case of a guardian, he must make a return if the net income of the individual is in excess of $1,000 if single, and in excess of $2,000 if married and living with husband or wife. In such cases the return must state the items of the gross income and the deductions and credits allowed by law. The guardian of a minor must make the return and pay the tax unless the minor does this himself. The trustee of an insane or incompetent person must make the return and pay the tax.

The law is not clear as to whether the trustee should in other cases pay the tax on income due by a resident beneficiary.[2] In the case of non-resident aliens who are beneficiaries, the trustee's duty is positive. He must deduct and withhold from income payable to them a tax equal to 8 per cent thereof, regardless of the amount paid.

All fiduciaries are likewise required to render returns of information to the Commissioner showing all payments of $1,000 or more in any taxable year to any beneficiary, and setting forth the amount of such payments in such form and manner as may be prescribed by the Commissioner.[3]

§ 211. Returns of Income Rarely Correct

So many of our population now pay an income tax that it would seem unnecessary to discuss here the general provisions of the law, especially as an adequate handling of this question alone would require a volume much larger than this. Within the last three years:

[2] Montgomery, Income Tax Procedure, 1921, pp. 1056, 1057.
[3] Revenue Act of 1918, § 225.

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> The country has ceased to regard the income tax as a novelty and has accepted it as an institution. The American people have quickly accommodated themselves to the tax, have readily grasped the principles underlying it and have learned to perform measurably well the large part which is expected from them in its administration.[4]

At the same time it is a fact that few returns of income to the federal government are correct. If too large a tax is paid the taxpayer is deprived of the interest on the money, and perhaps of the money itself if the error is not discovered. If he has paid too little he is subject to heavy penalties as well as being required to pay interest.

§ 212. Advantage of Expert Assistance

The fact that so few returns are correctly made indicates that it would pay to employ someone expert in income tax matters to prepare the return. Expert assistance should be secured if there is any complication whatever, but it is as necessary to use great care in selecting an adviser in tax matters as it is in choosing a lawyer. The Commissioner of Internal Revenue has warned the public against a certain class of so-called "income tax experts." The maker of your income tax returns should be chosen with care. Select, if possible, a firm of certified public accountants which had an established reputation before the days when the income tax was the thing which induced people to keep books—a firm which has a reputation for ability in general accounting rather than one whose only field is the income tax. Avoid the "expert" who, before knowing anything about your business, is sure he can save you money.

§ 213. Administration of the Law

The federal income tax law in force is the Revenue Act of 1918. It is administered by the Department of the Treasury of

[4] Montgomery, Income Tax Procedure, 1921.

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the United States, the Secretary of the Treasury being directly charged with its enforcement. The work of administration is in the hands of a branch of that department, the Bureau of Internal Revenue. Communications to Washington in reference to income tax matters should be addressed to the head of that Bureau, the Commissioner of Internal Revenue.

The law, subject to the constitutionality of all its provisions, is the final source of authority as to what the Bureau has a right to do. But the law, long as it is, does not begin to cover the many points arising in a matter which affects every recipient of income in the country. The Commissioner has issued various regulations setting forth his interpretation of the law, and it is in accordance with these regulations that forms are provided and taxes assessed. A taxpayer who does not believe that the Commissioner's interpretation is correct has the right to appeal to the courts, and on some very important matters the Bureau has been overruled.

§ 214. Law as to Fiduciaries

There are a few points in the income tax law which apply peculiarly to fiduciaries. These points will be considered in the following discussion, in which it has been assumed that the reader is acquainted with general income tax procedure.

The law defines a fiduciary as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate."[5]

The regulations amplify this definition by saying:

> "Fiduciary" is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors and administrators, and a fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of

[5] Revenue Law of 1918, § 200.

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another as in the case of receivers. A committee of the property of an incompetent person is a fiduciary.[6]

In this sense an agent is not a fiduciary if no legal trust has been created in the estate controlled by the agent.

§ 215. Returns for Estate

The returns required and the rules as to payment of income taxes due at the time of death have been set forth in Chapter XXVI. (See § 208.) The principles covering the returns for incomes of estates have been outlined in §§ 209 and 210.

The return for the income earned by the deceased is to be made on whatever form he would have used if he had been alive. The income earned by the estate is to be reported on Form 1041 if the tax is payable by the beneficiaries (see § 220), and on Form 1040 (revised), except that it may be on short Form 1040A (revised) where the net income does not exceed $5,000.[7]

Every fiduciary is responsible for making the return of income at annual intervals until the close of the estate or trust for which he acts. In the case of administrators this duty continues during the period required to perform the ordinary duties pertaining to administration—in particular, the collection of assets and the payment of debts and legacies.

It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not.[8]

[6] Article 1521 of Regulations 45.
[7] Article 421 of Regulations 45.
[8] Article 343 of Regulations 45.

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§ 216. Return Where There Are Two Trusts

> In the case of two or more trusts the income of which is taxable to the beneficiaries, which were created by the same person and are in charge of the same trustee, the trustee shall make a single return on form 1041 (revised) for all such trusts, notwithstanding that they may arise from different instruments. When, however, a trustee holds trusts created by different persons for the benefit of the same beneficiary, he shall make a return on form 1041 (revised) for each trust separately.[9]

§ 217. Returns Must Indicate Each Beneficiary's Share

In the case of certain fiduciaries the tax is assessed directly against the fiduciary, and the income when distributed by him comes to the recipients no longer subject to income tax, since all the obligations of the law have once been met. (See § 219) In other cases the tax is not collected from the fiduciary, and the recipients of the income must include it in their personal returns and pay the tax (see § 220), but the fiduciary in every case is required to make a return of income, and to "include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made."[10]

§ 218. Personal Liability of Fiduciary

A fiduciary should not make a final distribution until all past returns have been audited, including those covering the decedent's life, for any additional tax arising from such returns is a charge against the estate.

> Liability for payment of the tax attaches to the person of an executor or administrator up to and after his discharge, where prior to distribution and discharge he had notice of his tax obligations or failed to exercise due diligence in determining whether or not such obligations existed.

[9] Article 423 of Regulations 45.
[10] Revenue Act of 1918, § 219 (b).

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Liability for the tax also follows the estate itself, and when by reason of the distribution of the estate and the discharge of the executor or administrator it appears that collection of the tax can not be made from the executor or administrator, the legatees or distributees must account for their proportionate share of the tax due and unpaid. The same considerations apply to other trusts.[11]

Review Questions

1. What is the duty of an executor or administrator in regard to income returns and taxes on an estate being settled? When would a representative make returns and pay taxes?
2. What are the duties of a trustee as to income taxes and returns? What is the rule as to the estate of a non-resident alien? What is a trustee required to do in case of payments of $1,000 or more?
3. Why are returns of income rarely correct?
4. Why are the services of an expert desirable?
5. Who administers the federal income tax law? What is the relation of the Regulations to the law? What is a fiduciary? Distinguish between a fiduciary and an agent.
6. What is a personal representative required to do as to making returns? What are the duties of fiduciaries generally as to the income returns?
7. When a trustee has two or more trusts created by the same person, what return is to be made?
8. Who primarily pays the tax, the trustee or the beneficiary? Does this affect the trustee's duty as to reporting the income distributed?
9. When is the final return made? When is the tax paid?
10. What liability has a fiduciary as to payment of income taxes? How may he secure himself?

[11] Article 344 of Regulations 45.

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CHAPTER XXVIII

FEDERAL INCOME TAX—RULES FOR FIDUCIARIES

§ 219. When Tax Runs Against Fiduciary

The tax is imposed on the net income of the estate or trust and must be paid by the fiduciary on:

1. Income received by estates of deceased persons during the period of administration or settlement of the estate.
2. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests.
3. Income held for future distribution under the terms of the will or trust.

> From the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary. . . . Where under the terms of the will or deed the trustee may in his discretion distribute the income or accumulate it, the income is taxed to the trustee, irrespective of the exercise of his discretion. The imposition of the tax is not affected by the fact that an ultimate beneficiary may be a person exempt from tax.[1]

§ 220. When Tax Runs Against Beneficiaries

In the case of (a) a trust the income of which is distributed periodically, (b) an ordinary guardianship of a minor, and (c) an estate of a decedent before final settlement as to any income properly paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each beneficiary must include in his return his distributive share of the net income, even though

[1] Article 342 of Regulations 45.

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not yet paid him, but if the taxable year on the basis of which he makes his returns fails to coincide with the annual accounting period of the estate or trust, then he need only include in his return his distributive share for such accounting period ending within his taxable year. The regulations governing partnerships are generally applicable to such an estate or trust.[2]

It has been held, however, that where the income is not actually paid or credited to the beneficiary as specified in (c) above, it is not taxable to him, even though he was entitled to the payment or credit.[3]

The income of an estate or trust, the tax on which has been paid, is free from tax when it has been distributed to the beneficiaries.

As an intestate's real estate does not pass to his administrator, upon a sale by the heirs, whether before or after settlement of the estate, each heir is taxed individually on any profit derived.[4]

§ 221. Estates and Trusts Which Cannot Be Treated as a Unit

In the case of certain estates and trusts, it is recognized that the estate or trust cannot be treated as a unit for income tax purposes and may represent an aggregate of distinct interests to all of which the fiduciaries are responsible. . . . (a) When there is income distributable periodically and also income which is to be accumulated in trust, held for future distribution, or added to the corpus; (b) when there is income distributable periodically and also income (according to the Federal income tax statutes and regulations) which is not distributable periodically under state law, e. g., gains from sale of capital assets; (c) when there is income distributable periodically and deductions (according to Federal income tax statutes and regulations) which are not deductible under state law from the distributable income, e. g., losses from the sale of capital assets, depletion, depreciation.

[2] Article 345 of Regulations 45.
[3] Advisory Tax Board Regulation 47, Bureau of Internal Revenue.
[4] Article 342 of Regulations 45.

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> In ascertaining whether an estate or trust comes within any one of the cases just enumerated, the provisions of the Federal statutes and regulations—rather than the provisions of the will or trust and the provisions of state laws—shall determine what items constitute taxable gross income or allowable deductions; the provisions of the will or trust and of state laws shall determine the allocation of items of gross income or deduction; that is, to which of the different interests making up the whole such items shall be charged or allowed. . . . The items of gross income and deduction as determined by the Federal income tax statutes and regulations must be scrutinized and classified in accordance with the provisions of the will or trust or rules of local law into two classes. . . . The result will be that the beneficiary to whom income is to be distributed periodically must include in computing his net income the amount actually distributable to him (except exempt income) even though the aggregate of the distributive shares should be larger than the net income of the estate or trust computed as a unit. Any gain, profit, or income which is not periodically distributable, must be included in computing the net income of the estate or trust so that the fiduciary will pay the tax upon any excess of the net income of the estate or trust computed as a unit over the aggregate distributive shares.[8]

Any fiduciary or beneficiary who comes under the above regulations should consult a properly qualified accountant.

§ 222. Voluntary Trusts

The income of a revocable trust must be included in the gross income of the grantor, because if the grantor of voluntary and revocable trusts were allowed to pass the tax along, the result would be that persons whose income ran into high surtax rates would be able to arrange for the transfer of part of that income into the reports of others whose income, being lower, was not taxable at such a high rate, thus defeating the intention of the law.

[8] Article 347 of Regulations 45.

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§ 223. Credits to Which Beneficiaries Are Entitled

The return filed by a fiduciary against whom the tax does not run shows the part of the income accrued to each beneficiary, and in the same way shows the credits which may be taken by each beneficiary, who:

> . . . is allowed for the purpose of the normal tax, in addition to his individual credits, his proportionate share of such dividends from domestic and resident foreign corporations and of such interest not entirely exempt from tax upon obligations of the United States and bonds of the War Finance Corporation as are received by the estate or trust. Each beneficiary is entitled to but one personal exemption, no matter from how many trusts he may receive income.[6]

When the beneficiary has computed the amount of tax due on his personal return he is allowed to deduct from that tax his proportionate share of the amount of any income and profits taxes paid by the fiduciary to foreign countries and to possessions of the United States.

It should be noted that although the fiduciary may not have been required to make a return because the income of the estate was too low, each beneficiary of an estate or trust against which the tax does not run must nevertheless include the amount of income he receives from the estate, no matter how small, in his own return.

§ 224. Exemption for Liberty Loan Bonds

> When income is taxable to beneficiaries . . . each beneficiary is regarded as the owner of a proportionate part of the [Liberty loan] bonds held in trust and is entitled to exemption on account of such ownership as if he owned such proportionate part of the bonds directly. In such a case a subscription by a trustee for bonds of the fourth Liberty loan, or notes of the Victory Liberty loan, constitutes each beneficiary existing at the time of such subscription an original

[6] Article 346 of Regulations 45.

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subscriber for his proportionate part of such bonds or notes, as the case may be, and entitles such beneficiary to the appropriate collateral exemption of interest on bonds of previous issues, whether owned by such beneficiary or by the trustee, as if the beneficiary had himself originally subscribed for such proportionate part of the bonds or notes; and a subscription by such beneficiary for bonds of the fourth Liberty loan or notes of the Victory Liberty loan, as the case may be, entitles him to the appropriate collateral exemption of interest on bonds of previous issues held by the trustee.[7]

To be deemed an original subscriber to bonds for the purpose of claiming the conditional exemptions, the beneficiary must have been such when the original subscription was made.

§ 225. Gross Income Defined

Gross income is, generally speaking, the same for fiduciaries as for individuals, and:

... includes gains, profits, and income derived from salaries, wages, or compensation for personal service ... of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.[8]

The proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured are not to be included in gross income. The supreme court [9] has declared stock dividends not taxable for either normal tax or surtax.

No taxable income or deductible loss results from the passage of property to the executor or administrator on the

[7] Article 81 of Regulations 45.
[8] Revenue Act of 1918, § 213.
[9] Eisner v. Macomber, 252 U. S. 189.

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death of the decedent, even though such property has appreciated or depreciated in value since the decedent acquired it.[10]

Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income taxable to the estate.[11]

If, however, a legacy to be divided equally or in a certain ratio is, in accordance with mutual agreement, divided upon the basis of the market value or some otherwise determined value of the legacy at the time of distribution, which may be in excess of the value at the date of decedent's death as appraised for federal estate tax purposes, the estate derives no taxable gain from the transfer of the securities to the legatee, but when the property is sold by the legatees the amount of gain or loss in that sale is the difference between the selling price and the value of the property at the date of the testator's death, as appraised for the purpose of federal estate tax.

Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death of the life tenant.[12]

§ 226. Normal Tax Credits

For the purpose of the normal tax only, the credits allowed fiduciaries are dividends, interest on United States government bonds and bonds of the War Finance Corporation, and an exemption of $1,000, but no credit for dependents. In reference to the specific exemption of $1,000, it will be recalled (see § 208) that one of the first acts of an administrator or executor is the filing of an income tax return for part of the last year of the decedent's life, and that he must at the end of the decedent's full taxable year file a return of income for the remainder

[10] Office Decision 731, Bureau of Internal Revenue.
[11] Article 343 of Regulations 45.
[12] Office Decision 727.

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of the year. In making this later return he is allowed to claim an exemption of a full $1,000 for the remaining portion of the first year, and an exemption of $1,000 for each year or fraction of a year for which he must afterward file returns. If the decedent's income for the part of the last year of his life was so low that the representative was not required to file a return, he need not make any return for him nor is he required to account for such:

> . . . unreported income when he reports for the estate and its beneficiaries. Such income is entirely ignored so far as the income tax is concerned.[18]

§ 227. Deductions Allowed in Determining Net Income

The expenses necessarily incurred in the management of the property of an estate are ordinarily deductible to the same extent as for individuals. There are a few exceptions, however, which should be noted.

The initial expenses of the administration of the estate, such as court costs, attorneys' fees, executors' commissions, etc., which are properly chargeable against the corpus of the estate (see § 110), are not allowable deductions in computing the net income of the estate.

In the same way state inheritance taxes are not deductible when these taxes are payable from the corpus or principal, but if the statutes of a state require them to be satisfied from the income of the estate, they may be deducted from income in computing the taxable amount.

It is permissible for every fiduciary to deduct a proper amount for the depreciation sustained during the taxable year, but a beneficiary is not permitted to claim such a deduction on assets of the estate.

In lieu of the deduction for contributions allowed individuals, fiduciaries may deduct any amount:

[18] Montgomery, Income Tax Procedure, 1921, p. 1035.

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. . . which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children and animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.[14]

The amount of undistributed net income which is retained and permanently set aside for certain charitable and educational organizations designated by the will of a decedent, which were in existence at the time such income was permanently set aside, and was then reinvested for the estate, falls within the meaning and intent of . . . the Revenue Act of 1918. . . .

Therefore the income so permanently set aside, retained, and invested by the executors and trustees is not subject to tax. This does not, however, apply to income set aside for the benefit of an organization not fully in existence as to which no deduction is authorized.[15]

§ 228. Deductions for Losses

Any loss resulting from the sale of stocks, bonds, or other property constituting a trust asset, is under all circumstances an allowable deduction from the gross income of the trust if such a loss would be an allowable deduction from the gross income of an individual, but is not allowable as against the current or future gross income of the present beneficiaries or of those who will receive the property at the termination of the trust. In other words, the regulations hold that if the trust suffers a loss in excess of its income for the year, the beneficiaries are not, under the regulations, allowed to deduct their *pro rata* shares of the loss from their income from other sources. It is doubtful if this provision could be enforced in

[14] Revenue Act of 1918, § 219.
[15] Recommendation 280 of the Committee on Appeals and Review, Bureau of Internal Revenue.

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court. This is one of those many cases, where the rights of the taxpayer must wait on the decisions of the courts.

§ 229. Computation of Tax

The tax payable by a fiduciary is computed in the same manner and with the aid of the same sliding scale of rates as for individuals. These rates are shown on the forms used for the preparation of the returns.

When the tax has been computed, there may be deducted from it the amount of income or profits taxes paid during the taxable year to foreign countries and possessions of the United States.

§ 230. Certain Penalties Not Applicable

> The estate of a deceased person, regardless of the date of his death, or of an insane or insolvent person, cannot be charged with liability to the 5 per cent penalty on account of his or the fiduciary's delinquency in making payment of taxes.[16]

Estates of decedents are also exempt from the interest at the rate of 1 per cent a month, which is imposed if the tax remains unpaid after ten days' notice and demand, and from the 6 per cent interest added when claims for abatement are disallowed, except that exemption from penalty does not extend to a decedent's estate when claim for abatement on the ground of loss in inventory is disallowed.

§ 231. Exemption Allowed Surviving Husband or Wife

> If a husband or wife . . . dies and the joint personal exemption is used by executor or administrator in making a return for the decedent, an undiminished personal exemption according to the status of the survivor at the end of the taxable year may be claimed in the survivor's return.[17]

[16] Article 1006 of Regulations 45.
[17] Article 305 of Regulations 45.

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§ 232. Returns of Information

Another form which fiduciaries are required to fill out is Form 1096 (revised), which is really a letter of transmittal accompanying Form 1099 (revised), which must also be used. On these forms it is required that:

> All individuals, corporations, and partnerships, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another individual, corporation, or partnership, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income [except dividends and transactions by brokers] of $1,000 or more in any taxable year . . . shall render a true and accurate return . . . setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.[18]

On this same Form 1099, fiduciaries are requested to prepare:

> . . . reports for each beneficiary of the estate or trust, showing in every case the distributive shares of the members or beneficiaries, whether or not actually distributed.[19]

Such reports on Form 1099 (revised) are to be filed with the collector with the returns of income, instead of being transmitted to the Commissioner accompanied by Form 1096 (revised).

§ 233. Fiduciaries as Withholding Agents

When a fiduciary pays rent, salary, interest, or other fixed or determinable income to non-resident aliens, he acts in the capacity of a withholding agent, and is subject to the law's general specifications covering withholding agents.

A citizen or resident fiduciary who has the distribution of trust income for which there is a non-resident alien beneficiary,

[18] Revenue Act of 1918, § 256.
[19] Article 1073 of Regulations 45.

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must make an income tax return for each such non-resident alien and pay the tax. But when the fiduciary distributes any part of the principal or corpus of the estate, no tax is due, as the tax is deducted only on income payments. Since gifts, bequests, and legacies are not taxable income, property coming to the estate in that manner may be distributed among the beneficiaries without regard to the tax. But of course profit arising from the ownership of such property is taxable, and must be paid by the legatees.

Since the provisions covering fiduciaries as withholding agents are the same as for other withholding agents, they will not be commented on here beyond calling attention to them.

§ 234. State Income Tax Laws

There have been a number of attempts at the establishment of the income tax as a means of raising revenue for state use, but the first of these was so disastrous that it required Wisconsin, that forerunner in matters of well-thought-out legislation, with a law passed in 1911, to prove that state income taxes were feasible. Since that time a number of other states, including Connecticut, Massachusetts, and New York, have adopted laws taxing incomes. Other states may be expected to do likewise. There are many differences among these various laws and between these laws and the federal law, and amendments are frequent. It will be necessary in each case to consult the state enactments on this subject, in states in which an income tax law exists.

§ 235. Bibliography

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Seligman, E. R. A. The Income Tax. Macmillan Company, 1914.

Review Questions

1. What income tax must be imposed on an estate in settlement? Under what circumstances must a trustee pay an income tax?
2. In what cases must the beneficiaries make a report and pay taxes? If the income tax had been paid before distribution, would any further tax be required? If real estate is sold at a profit, who pays the income tax?
3. Under what circumstances is it impossible to reckon income taxes on the income as a whole?
4. If a trust is revocable, who pays the income tax?
5. If the beneficiaries are to pay the tax, what two things must the fiduciary's return show?
6. To what extent may beneficiaries avail themselves of exempt bonds or notes purchased by the fiduciary?
7. What is the gross income of an estate? What is said of life insurance in this connection? What of stock dividends? When is there any increase in value of the trust property income?
8. For normal tax purposes, what credits are allowed trustees? What exemption may an executor secure twice?
9. What deductions are allowed executors? Why are initial expenses not allowed? Are inheritance taxes deductible? Are deductions allowed for depreciation? What contributions may be deducted?
10. What losses may be deducted? Can beneficiaries take advantage of losses to the estate in making up their own income returns?
11. How is the income of an estate in trust computed? What income taxes may be deducted?
12. What exemption from penalty applies to estates? What exemption is allowed the surviving husband or wife?

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13. What information must trustees give? When must a trustee act as a withholding agent? What distinction is made between distributing income and corpus?
14. What must be done in regard to state income taxes?
15. In consulting books on tax matters, why is it necessary to secure late editions?

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CHAPTER XXIX

PECULIAR FEATURES OF INHERITANCE TAXATION

§ 236. Inheritance Taxation in the United States

The form of taxation known generally as "inheritance taxes," "transfer taxes," "succession taxes," and in Connecticut as "death duties," is not new. During the Revolution, the Civil War and the Spanish War, the federal government resorted to forms of this tax, but repealed the acts as soon as the stress was over. During the Great War the federal government resorted to this tax again, and this last impost is likely to remain with us unless the courts pronounce the law in its present form unconstitutional.

The policy of taxing collateral inheritances was adopted in Pennsylvania in 1826, and has been adhered to in that state ever since. In Virginia such taxes have been imposed since 1844. In 1885 New York passed its state law imposing an inheritance tax, and since that time the state legislature has made over ninety changes and amendments, some of them radical. This evolution by experimentation is still in process. The plan has generally appealed to state authorities, and the New York statutes have been copied in nearly every state in the Union. At the time of this writing the only states having no inheritance taxes are Alabama, Florida, South Carolina, and the territory of Alaska. It will undoubtedly be a permanent source of revenue for the states.

§ 237. The Theory of Inheritance Taxes

All of these taxes are based on the theory that, as the right of inheritance and the right of directing the ownership of

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property by will are given by the law, the law may properly tax the exercise of these rights. In other words, there is no natural right to inherit or to leave property by a will. The law gives and defines these rights. It now says that a part shall go to the state for the privilege granted.

> Fundamentally the tax rests upon the proposition that a man cannot take with him into the world beyond the possessions he has acquired here. When he dies those possessions become the property of the State or of such persons as the laws of the State may direct.[1]

Inheritance taxation is not a tax on property, but it is either a tax on the right or privilege of transferring property by will or a tax on the right or privilege of receiving property from the dead.

> As the privilege or right to take property by inheritance or devise is not a natural or inherent right of persons, but is a creation of the law, it is subject to regulation by statute, and the imposition of the tax as incident to the right is authorized under our governmental system when not expressly forbidden by the constitution.[2]

In England these taxes are called "death duties," and they attach on death at the same time that the rights of the legatee or the heir attach. The Supreme Court of California said:

> It is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate, and the Legislature can provide that the whole or only a portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the Legislature in this case having determined that 95 per cent of the decedent's estate may go to his heirs, and that 5 per cent be retained by the State, it is too clear for argument that this 5 per cent vested in the State at the same time that the other 95 per cent vested in the heirs.[3]

[1] Gleason and Otis, Inheritance Taxation (2nd ed.), 1919, p. 4.
[2] Booth v Commonwealth, 130 Ky. 38.
[3] Standford's Estate, 126 Cal. 112.

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These taxes yield large returns, especially in the older and wealthier states. Because of this fact and because they are paid when the parties concerned are receiving wealth without giving an equivalent, and so cause the least inconvenience, it is likely that as time goes by they will be changed only by a gradual increase of the present rates.

§ 238. Inheritance Taxes Are Constitutional

At different times it has been urged that inheritance taxes were unconstitutional in that they violated the rule of uniformity, that the exemptions were unconstitutional, that they deprived heirs of their property without due process of law, that they impaired the obligation of contracts, that they did not respect the privileges and immunities of citizens in the different states, and that they violated the Fourteenth Amendment. On final appeal the Supreme Court of the United States has in each case sustained the law and held that the objections were not applicable.

Some features of the inheritance laws of Minnesota, Wisconsin, and Pennsylvania have been pronounced unconstitutional by the supreme courts of these states, but the laws as a whole have been upheld and they are undoubtedly to be a permanent part of our tax laws.

These taxes as imposed by the states have been sustained by the courts against all constitutional objections on the broad doctrine that they are not laid on the property itself, but on the right to transmit property at death, or, what is more intelligible, on the right to succeed to property from the dead. Because of this doctrine, it is held that an inheritance tax may be laid on the right to inherit government bonds, which cannot in any other way be taxed. The courts hold to this and it is practically a part of our general law.

> The tax is not upon the property in the ordinary sense of the word but upon the right to dispose of it, and it is not

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until it has yielded its contribution to the State that it becomes the property of the legatee.[4]

§ 239. The Federal Estate Tax

The federal estate tax at present in force is based on Title IV of the Revenue Act of 1918. It differs from most state laws in that:

> . . . the subject of tax is the transfer of the *entire net estate*, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary have no bearing upon the question of liability or the extent thereof.[5]

The federal tax differs from other systems of taxation in the following particulars:

1. Since this tax is laid on the entire estate, not on a particular legacy or share, it diminishes only the residuary estate and not any specific legacies.

2. The value of the separate legacies or interests devised is ignored and does not affect the tax imposed.

3. The relationship of the legatee or devisee has no bearing on the liability to tax or on the amount of the tax that is imposed.

The federal inheritance tax is discussed more fully in Chapters XXXVII-XXXIX.

§ 240. What Transfers Are Subject to the Inheritance Tax

While inheritance taxes are levied on the transfer and not on the property itself, nevertheless they are measured and assessed by the value of the property as shown by the appraisal. They are broad in their application, for the inheritance of government, state, and municipal bonds that are tax-exempt is nevertheless subject to this impost or excise duty.

[4] United States v. Perkins, 163 U. S. 625.
[5] Article 1 of Regulations 37.

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The state inheritance laws tax transfers of:

1. All the property of a decedent in the state of his residence. This includes all real property in the state, and all personal property both in and out of the state.
2. All real estate of non-residents.
3. All personal property of non-residents actually or constructively in the state. This subject is treated at greater length in Chapter XXX.

§ 241. Double Taxation

A peculiar feature of the inheritance taxes is the fact that the same property is often taxed in two states. If a citizen of Illinois having a bank account in New York should die, his heirs would be taxed by the state of Illinois on all his property, which would include the New York bank deposits. These would be taxed also in the state of New York. There is no law or constitutional prohibition of double taxation. It is not just, but it is legal.

The supreme court has said and repeated:

> No doubt it would be a great advantage to the country and to the individual states if principles of taxation would be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far.[6]

§ 242. Rates of State Taxation

The New York tax on which most of the later inheritance tax laws of other states are based is laid as follows:

If property goes to father, mother, husband, wife, child, or adopted child, and the amount in each case does not exceed $5,000, there is no tax. Above $5,000 and up to $25,000

[6] Hawley v. Malden, 232 U. S. 134.

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the rate is 1 per cent. Above $25,000 and up to $100,000 the rate is 2 per cent. Above $100,000 and up to $200,000 the rate is 3 per cent. All excess is at 4 per cent. To grandchildren the rates are the same, but there are no taxes if the amount is less than $500.

To brother, sister, son-in-law, or daughter-in-law, if the value of the property inherited is over $500 the rates in each block are 1 per cent higher than those stated above.

To more remote kindred and strangers, legacies above $500 are taxed at rates higher by 4 per cent in each block than those for mother, father, husband, wife, child, or adopted child.

In other states the exemptions and the rates are varied, and as changes are being made continually, in each case the latest law must be consulted. In California, for instance, the exemptions for immediate relatives are much higher, being $24,000 for widow or minor child. The rates too are much higher, going up to 15 per cent on legacies of over $1,000,000 to the immediate family, and to 30 per cent on legacies of over $1,000,000 to more distant kin.

Generally, the far western states have larger exemptions and higher rates. There does not seem to be any limit to the amount that a legislature may impose. In Georgia, the rate above the exemption is 1 per cent, and no more. This shows that the state is only starting in this direction, that conservatism is strong, and that only the thin edge of the wedge has been inserted. In Iowa, Maryland, and some other states, there is no tax on property going to immediate kin. In Kansas, the wife is allowed an exemption of $75,000. In some states no tax is levied on property going to husband or wife, or to lineal heirs. Other minor variations are to be found, but the general character of the laws is the same in all the states.

It is to be noted that the state transfer taxes generally

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increase: (1) as the amount transferred increases, and (2) as the degree of relationship diminishes.

In the present somewhat confused condition of the law relating to inheritance taxes, it has been held that executors could, in some cases where part of the assets were in another state, arrange to pay legacies to collateral relatives from the foreign assets at a lower rate of tax than prevails in the state of domicile. This can be done to advantage only in a few instances, and it is not likely that it will be possible when inheritance taxes attain a more harmonious development.

Review Questions

1. When has inheritance taxation been used by the federal government in this country? What states first adopted inheritance taxation?
2. What is the theory of inheritance taxation? Is it a tax on property? Explain. Why are the rates likely to increase? What are the arguments in favor of the system?
3. What constitutional objections have been urged against inheritance taxes? What attitude has the supreme court assumed? On what broad ground have inheritance tax laws been upheld?
4. In what three particulars does the federal transfer tax differ from any state laws?
5. How are inheritance taxes calculated? Would the inheritance of Liberty bonds be taxed? What property in a state comes under this tax?
6. How does double taxation arise? Is there any remedy for double taxation?
7. In your state, is there any exemption? In your state, what are the rates? Usually what two causes operate to increase the rate of taxation?

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CHAPTER XXX

PROPERTY AFFECTED BY TRANSFER TAXES

§ 243. Comprehensiveness of Transfer Taxes

Because inheritance and transfer taxes are not taxes on property, but are excise or impost taxes on the succession to or inheritance of property, they attach to the inheritance of all kinds of property or rights that have value or that are transferred at death. They extend to all the assets of a man's estate, and include every valuable right or claim that can be transferred to another. The state may lay an inheritance tax on any resident's property or business wherever situated.[1]

The New York Statute expresses it broadly as follows:

> The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individuals or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without the state.[2]

All property passing by will or inheritance is subject to these taxes. As the law is usually phrased, it is rarely practicable to evade payment. A testator's order directing that no inventory be made will not hold when there is an inheritance tax. He may direct that the amount of the taxes be paid as an expense of administration, so that the legacies shall be paid at their face value, but this will not affect the total amount to be paid. He could also make the legacies many and small,

[1] State Tax on Foreign Bondholders, 15 Wall. 300.
[2] Laws of 1910, Chapter 706, Art. X, § 243.

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which would reduce the taxes levied by the states but would not reduce the federal tax.

In a curious case in Massachusetts, certain trustees of property organized a corporation in Maine with a nominal capital. In Maine at that time there was no inheritance tax. To this corporation they transferred certain valuable Massachusetts bank stocks. The Maine corporation issued certificates for the stock received and agreed to return a like amount on demand. The Maine corporation had the shares transferred on the books of the bank, and apparently the Maine corporation was the only owner. When the original owner died, the right of Massachusetts to tax the inheritance came into the courts, which swept away the whole device and imposed the tax as if the Maine corporation had never existed.[3]

§ 244. Situs of Property

The legal doctrine as to the "situs" or location of property is of much importance in the matter of its subjection to death duties. The broad general rule is that for purposes of taxation personal property is all assumed to be situated at the domicile of the decedent, and real property is to be taxed where it is situated. If this were all, the tax would be paid once for all in the state of decedent's domicile, and for land in the state where it was located, and there would be no double taxation.

It is the following additions to the rules as to personal property that are confusing:

1. If any chattels or other personal property is situated in another state, that state may impose its own tax upon the goods.

2. If among the decedent's assets are shares of stock in a corporation organized under the laws of another state, that state also may impose its inheritance tax on the value of the stock.

[3] Gardner v. Treasurer, 225 Mass. 355.

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3. If money is owing to the decedent by a citizen of another state, it may be taxed by the state in which the debtor lives.

As these examples show, this entire branch of the law is in a process of evolution which leads to frequent amendment of statutes and to conflicting decisions of courts.

§ 245. Rule as to Real Estate

Real estate is usually taxed only in the state where it is situated, and not elsewhere. If it is mortgaged, the amount of the mortgage is deducted from the appraised value of the land and the remainder, termed "the equity of redemption," is taxed. Even where a non-resident testator has directed that real property be sold and the proceeds distributed, these proceeds are not taxed by the state in which they are distributed.

Pennsylvania is an exception to the general rule, and citizens of Pennsylvania owning real estate in other states must pay the state of Pennsylvania and the state in which the land is situated as well. The same practice holds when real estate in another state is converted into cash for division among the heirs. If a citizen of Pennsylvania owned land in New Jersey and directed that it be sold and the proceeds divided among his heirs, the land would be taxed in New Jersey and the proceeds would be subject to another tax in Pennsylvania.

The location, or "situs," of a debt secured by a mortgage on real estate is in the state in which the creditor has his domicile. In Massachusetts, Michigan, and Maryland, the rule is otherwise.[4] Where real property is held by trust associations, as is common in Massachusetts, the shares, even when owned outside the state, are subject to transfer taxes in Massachusetts. Shares in such trust associations are considered as interests in real estate and are taxed as such even when owned out of the state by non-residents.

[4] McCurdy v. McCurdy, 197 Mass. 248; Kenney v. Stevens, 207 Mass. 368.

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If the decedent had contracted to sell land that he owned in another state, this contract would not be taxable in the state where the land was situated. Nebraska is an exception to this rule. Money due on a contract to sell real estate is not considered taxable as real estate in the state where the real estate is, except in Nebraska.

A lease of real estate (when not a liability) is personal property and not real estate. A perpetual lease is realty.

§ 246. Personal Property—Tangible

The New York Statute [5] contains this definition:

> "Tangible property" as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt.

Personal property was once supposed to follow the domicile of its owner, but in enforcing the transfer tax the several states have adopted the rule of imposing a tax on everything in their jurisdiction, whether belonging to a resident or a non-resident; therefore, money in bank, notes and valuables in safe deposit, books, furniture in houses, merchandise in stores, and in fact any kind of tangible property in a state, is taxable by that state when the owner dies.

If the owner of the chattels was a non-resident, his executor will probably have to pay a transfer tax on the same property in his state of domicile. This is double taxation, but, as has been stated, there is no constitutional or other prohibition against double taxation.

§ 247. Personal Property—Intangible

1. Transfers of all intangible property are taxed at the place of domicile of the owner. Both the state in which a

[5] Laws of 1910, Chapter 706, Art. X, § 243.

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corporation is domiciled and the state in which the corporation was organized and has its business office[6] may tax all stock transfers resulting from the death of a former owner, no matter where he lived. Such transfers are taxable also at the former domicile of the deceased owner.[7] Under some circumstances triple taxation would thus be possible.

2. If intangible property is kept on deposit in another state, it may be taxed there.[8] Such property of a non-resident in the hands of a trustee is not taxable in Pennsylvania.[9] The bank account of a non-resident is subject to inheritance taxes by the state in which the bank is situated and by the state in which the owner lived. This is another of the cases in which double taxation occurs.[10]

3. Bonds and notes and mortgages against persons or secured by real property in the state, if owned by non-residents and kept out of the state, are not taxable by the state where the debtor lives or where the real property is situated,[11] except that mortgages, notes, and land contracts secured by or relating to Michigan land held in another state by a non-resident of Michigan, are nevertheless subject to an inheritance tax in Michigan, on the ground that the obligations so secured cannot be collected without the aid of the laws of Michigan.[12]

§ 248. Rule as to Life Insurance

Generally, life insurance in favor of another than the decedent is not part of the estate and is not taxed under the inheritance laws. It was the one way of providing for one's dependents that was not taxed, but if the proceeds of a policy are payable to the estate they become part of the estate and

[6] McDougal v. Low, 164 Cal. 107; Greeves v. Shaw, 173 Mass. 205.
[7] Hawley v. City of Malden, 232 U. S. 1.
[8] Wheeler v. New York, 233 U. S. 434.
[9] Re Helena, 46 L. R. A. (N. S.) 1167.
[10] Blackstone v. Miller, 188 U. S. 189.
[11] State Tax on Foreign Bondholders, 15 Wall. 300.
[12] In re Rogers' Estate, 149 Mich. 305.

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are taxable as are any other assets. The present federal inheritance tax law, however, taxes all insurance over $40,000, even when in favor of dependents. (See § 334.)

§ 249. Dower and Curtesy

A widow's dower or one-third life estate in her husband's real property is generally held not to be taxable as an inheritance. But in Illinois and North Carolina the law is different and dower estates are held taxable, and the federal law especially includes dower and curtesy interests.

If a bequest in lieu of dower is made and the widow elects to take it, the tax will be collected on the bequest. Special allowances to the widow are generally held to be tax-exempt.

The husband's right to tenancy by curtesy is taxable by the federal government but not by the states unless expressly so specified in the state transfer tax law, as is the case in New York. Under state laws the same rule applies to the husband's common law marital rights to inherit all the personal property of a wife who died without leaving a will or issue surviving. If a wife wills all her property to her husband, it is subject to the tax. In those states whose law is derived from the civil law of Rome, the wife has a one-half interest in the community estate; that is, one-half of the gains and profits of the marital partnership. This interest is not taxable under the inheritance tax laws of those states, as the survivor is held to own the one-half in his or her individual right.

§ 250. Property Held Jointly or by Tenants in the Entirety

A joint tenancy is "a tenure by two or more persons of estate by unity of interest, title, time, and possession, under which the survivor takes the whole." (Blackstone.)

A tenant in common is one holding real or personal property in common with others having distinct but undivided interests, and a survivor has no more than his own share.

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It is not often that estates are held jointly, but when they are, the law is that the survivor takes the whole property. This is the peculiar feature that distinguishes joint tenancy. It often happens, though, that a bank account or an interest in stocks is held jointly by husband and wife in order that on his death she may have immediate funds. In those states where the transfer tax applies to joint bank accounts, this object cannot now be attained, for neither may draw from the joint account upon the death of the other, and the account would be tied up until the state authorities had acted in the matter.

Unless specifically mentioned in the transfer tax law of the state, such survivorship is not taxable. In several of the states it has been sought to tax the interest going to the survivor. In New York it was sought to tax the whole value. Accordingly, the value of such property required to be returned for tax in New York is *the value of the entire property,* unless it can be shown that part or all of it originally belonged to the other joint owner and never belonged to the decedent.

In New York and California the statutes now prescribe that the survivor of parties interested in a joint account or in joint property shall take the whole and pay a transfer tax on the value of the whole. In California, the court decided that the statute did not apply to a joint tenancy created before the statute was passed in 1917.[13] The decision would have been different if the joint tenancy had been created after the act had been passed.

In New York the court held that when the joint interest existed before the statute, the survivor could be taxed on one-half,[14] but in a later case it was held that the whole of a joint bank account created after the statute went into effect was subject to the tax.[15] In another late case the court stated that if the survivor were shown to have given value for his interest,

[13] Gurney's Estate, 177 Cal. 211.
[14] Matter of McKelevy, 221 N. Y. 15.
[15] Matter of Dolbear, 226 N. Y. 623.

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the question of tax in such case would be open.[16] The estate might show that the survivor really owned the fund, in which case no tax would be due, or the state authorities might show that the decedent owned the entire fund, in which case the tax would be on the whole.

A tenancy in or by the entirety is that special form of joint tenancy which exists when a third party deeds real estate to husband and wife jointly: they take as tenants by the entirety and neither can convey the property without the consent of the other; and the survivor succeeds to the whole. Such succession is not taxable under the usual transfer tax laws. In 1916 the New York legislature passed a law taxing such estates, but it was repealed the next year.

§ 251. Transfers by Decedent in His Lifetime

It is not uncommon for men of advanced years to act as their own executors, giving all or part of their property to those to whom they would otherwise leave it by will. This is in many cases an admirable thing to do, but the state considers that such transfers as are made to take effect at death, or are made in contemplation of death, are subject to the transfer tax.

The law on this subject varies in the different states, and the decisions of the courts are not harmonious.

A gift to take effect at death is taxable under all of the statutes, but a transfer to take effect at death upon adequate consideration would not be taxed.[17]

A gift of property in which the donor retains a life interest is a gift to take effect at death and is taxable. Where the arrangement involves no life interest, but the donor reserves a power to revoke, it is held to be a gift to take effect at death and is taxable.

[16] Matter of Buchanan, 184 App. Div. (N. Y.) 237.
[17] Estate of Reynolds, 169 Cal. 600.

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In a recent case a donor during life gave a fund of $1,000,000 to a trust company in Illinois, the income to be paid to himself, his wife, and four sons. On his death the fund was to be turned over to the other beneficiaries. He also reserved a right to revoke and to control the investment. He then moved to Wisconsin and became a resident. When he died, both states imposed inheritance taxes on his estate. His family fought the Wisconsin tax and it was carried to the Supreme Court of the United States, which sustained the right of both states to tax the transfer of the fund.[18]

Every case to which these provisions might apply must be considered separately, and the separate provisions of the law (and possibly of the Constitution itself) weighed against the facts in the particular case.

§ 252. Property Passed Under Power of Appointment

It is common for property to be left to a son, daughter, or other relative for life and thereafter to such person as the son or other relative shall appoint. In such case the original testator would be called the "donor"; the life tenant would be called the "donee," and the person whom the donee appointed, the "grantee."

The question of what, if any, inheritance tax should be paid upon the exercise of a power of appointment is complicated by conflicting laws and court decisions. To state positively in any particular case what would be the tax liability would require the judgment of a careful lawyer who had looked up the legislation and the court decisions in the state where the tax was to be paid. In the earlier cases, if the will giving a power of appointment was executed before the transfer tax became a law, and the donee appointed those who would have inherited under the will if no appointment had been made, the appointees might elect to take as under the original will.

[18] Bullen v. Wisconsin, 240 U. S. 625.

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In some states, if the will was executed before the transfer tax was imposed, no transfer tax would be payable.

For example, A executed his will before a transfer tax law was passed, leaving his property to his son B, and to such sons of B as B should appoint. If B appointed his only son C, to whom the property would have gone had B not exercised his power of appointment, B's son might elect to take under the original will, and in New York no transfer tax would have been paid.[19]

In Massachusetts, however, the same provisions of statutory law were construed otherwise and the tax could not be avoided by any such election.[20]

In New York, if the donee made the appointment of part to pay creditors, the tax would have been laid on the part so appointed, but if the balance had gone to beneficiaries who would have taken under the original will, no tax would have been imposed on that part.[21]

The tax is not on the property passed but on the privilege of acting on the authority given by the power of appointment, and if the donee is in the jurisdiction of the state and the property is transferred by the laws of this state, the fact that the property is situated outside of the state does not affect the state's right to tax. The question in each case is: Does the execution of the power give the grantee the property conveyed? [22]

The present New York Statute is as follows:

> Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter, in the same manner as though the property to which such appointment relates

[19] Matter of Lansing, 182 N. Y. 138.
[20] Minot v. Treasurer, 207 Mass. 588.
[21] Matter of Slosson, 216 N. Y. 79.
[22] Matter of Hull, 111 App. Div. (N. Y.) 322.

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> belonged absolutely to the donee of such powers and had been bequeathed or devised by such donee by will.[23]

That is, if in 1870, before the transfer tax law was passed, A left property to his son B for life and at B's death to whomever he might appoint by will or deed, and fifty years later B wills or deeds it to C, a tax shall be paid the state as if the property had belonged to B and had been left by B's will to C.

It was naturally argued that if B deeded the property to C instead of leaving it by will, a transfer by deed was not taxable, but the courts held that under the statute as it now stands the law was otherwise. The court of appeals said:

> The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever except such as rest in the discretion of the authority which exercises it.[24]

Review Questions

1. Are inheritance taxes taxes on property? Why? How comprehensive are they? Is there any way to evade or avoid them?
2. What is the general rule as to the situs of property for inheritance taxation? What are the exceptions to the rule? What causes the confusion as to the tax on personal property?
3. Where is real estate taxed? What is the peculiar rule in Pennsylvania? What is done if the real estate is mortgaged? Where is the mortgage taxed? Where are shares in trust associations taxable? What is the rule as to leases?
4. What is tangible property? What is not tangible property? What rule have the states adopted in taxing personal property of both kinds? How does this result in double taxation? At what time is personal property valued for taxation?

[23] Laws of 1919, Art. 10, § 220, subdiv. 6, as amended by Chapter 626.
[24] Matter of Wendel, 223 N. Y. 433.

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5. Where is corporate stock taxed? Where is money in bank taxed? Where are bonds, notes, and mortgages taxed?
6. What is the law as to life insurance? What is the federal law on this subject? What if the insurance is payable to the estate?
7. In what states is dower subject to the inheritance tax? When is the right of curtesy taxable? Is a bequest to husband or wife taxable?
8. What is joint tenancy? What distinguishes it from tenancy in common? Is the estate of the survivor of a joint tenancy taxable in your state? What is tenancy by the entirety? Is the estate of the survivor taxable?
9. Can property be transferred in life, the transfer to take effect at death, so as to evade the tax? Would an absolute transfer made without consideration, before death, be taxable by the state? What circumstances would affect the probability of tax?
10. What is a power of appointment? When is the exercise of such a power taxable in your state? Would the execution of the will creating the power before the transfer tax law was passed affect the result in your state?

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CHAPTER XXXI

MATTERS OF PROCEDURE

§ 253. Domicile

Anyone living in a state is subject to its laws and after his death his personal property is subject to its inheritance laws. His real estate is subject to the laws of the state where it is situated. The probate court of the county in which the decedent lived will have original jurisdiction. If he left a will it must be probated there, and if he died intestate the probate court of his county will appoint an administrator.

In these days, when people move so readily from place to place, and when wealthy men may have several residences, sometimes adopting a domicile purposely to evade inheritance and other taxes, it is not always easy to ascertain the real residence of a decedent. The rules by which domicile is determined are as follows:

1. Every person must have a domicile somewhere.
2. A person can have but one domicile.
3. A married woman's domicile is that of her husband unless she lives apart from him and thereby acquires a separate residence.
4. The original domicile of a person is presumed to continue until a new one is acquired.
5. The burden of proof rests upon the party alleging a change of domicile.
6. To sustain this burden, both a change of residence and intent to change the domicile must be shown.[1]

[1] Gleason and Otis, Inheritance Taxation (2nd ed.), 1919, p. 213.

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A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom.[2]

The existing domicile, whether of origin or selection, continues until a new one is so acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals.[3]

Mrs. Hetty Green during a long life of accumulation managed to avoid the payment of most of her share of the burden of taxation. The tax authorities of New York tried hard to hold her whole estate for the large inheritance taxes, which they affirmed should go to the state of New York, but the attempt was entirely futile; the court holding that her residence was in Bellows Falls, a small place in Vermont where she had a residence and in which she lived for six weeks in the summer time.[4]

Then the New York authorities tried to hold that part of the estate which she was using in the business of money-lending and investing in the state of New York. The surrogate's court held that this could not be done, but on appeal the higher court on May 14, 1920, held that she was in business and that all of the capital engaged in that business was liable to taxation. Owing to the amount involved, the case will probably be carried up to the court of appeals.

In New York a statute was passed declaring that anyone who passed the greater part of the last twenty-four months of his life in New York should "be deemed" a citizen of New York. An attempt was made to apply this to a citizen of New Jersey, who had voted in New Jersey, paid taxes in New Jersey, run for Congress in New Jersey, and in his will and deed had described himself as a native of New Jersey. He had a

[2] Article 5 of Regulations 37.
[3] Matter of Newcomb, 192 N. Y. 238.
[4] Matter of Hetty Green, 99 Misc. (N. Y.) 582 (affirmed 179 App. Div. 890).

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house in New York and a summer camp in the Adirondacks. The surrogate's court held that under the statutes he was a citizen of New York. This was reversed by the higher court. The court held that "be deemed" was not intended to be conclusive, but merely created a presumption that the party was a citizen, which could be disproved by contrary evidence.[5]

In Wisconsin and Illinois beneficiaries are taxed if they receive property from a decedent in another state. This is another case of double taxation. (See § 241.)

§ 254. Jurisdiction

The court having probate jurisdiction usually has jurisdiction over all matters relating to the ascertainment and payment of state transfer and inheritance taxes. Jurisdiction to grant letters gives jurisdiction as to all inheritance proceedings.

Generally, it is the duty of the executor or the administrator within some specified time after his appointment to initiate proceedings to secure appraisal and ascertainment of the amount of taxes due. If no will is filed and no one in interest applies for letters of administration, an officer of the state, the comptroller, the state auditor, the state treasurer, or the attorney-general may apply for the appointment of an administrator and the settlement of the estate.

In New Jersey, if no administration is applied for within three months after the death, and there is property unadministered, the comptroller may agree to give up to 10 per cent of the amount received by the state as a reward to any informer who notifies him of such property. The same rule holds as to property of a non-resident not administered in the state.

§ 255. Inventory and Appraisal

Within whatever period is allowed by the state law, usually two to three months, the personal representatives are required

[5] Matter of Barbour, 185 App. Div. (N. Y.) 445.

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to file with the probate court an inventory and valuation of all the assets of the estate. This inventory is filed on forms prescribed by the tax officials. Usually an official appraiser fixes the values. Where no official is provided, it is usually possible to have the probate judge appoint appraisers. In some states the valuations are placed by the personal representatives and if no objection is made these are accepted. This procedure is important and has been treated in Chapter XIII, "Making an Inventory," and as related to inheritance taxation is considered more fully in Chapter XXXIII, "Inventories," and Chapter XXXIV, "Appraisement."

§ 256. Ascertaining Values for Taxation

The transfer tax is computed on the value of the property at the time of death. The property of the estate is not appraised at its tax value at a forced sale, but is to be the value which would be agreed upon by a willing buyer and a willing seller.

In appraising inactive stocks and stocks of close corporations, dividends paid, private sales, opinions of experts, and the value of property held, may all be considered.

In many cases it is necessary to ascertain the present value of life estates, annuities, remainders, dower, curtesy, and the like. In most cases this would be referred to expert accountants to work out by the mortality tables and the prevailing rate of interest. The principles underlying the valuation of different assets are more fully discussed in Chapter XXXIV, "Appraisement."

§ 257. Assessment of Tax

In most states, the judge of probate assesses the tax. In New York, the surrogate does this as a matter of routine, merely signing an order as prepared by the appraiser or the attorneys for the state. This is a matter of record and before

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the court. The surrogate himself, if not satisfied with the result, may send the report back to the appraiser for further action, or the state may do the same by its representatives, or those who must pay the tax may appeal from the *pro forma* taxing order to the surrogate.

In Massachusetts, the tax commissioner determines the tax and notifies the executor or administrator who is liable. His determination is final unless some of those interested apply to the probate court within one year after the payment of the tax, for an abatement. If the court finds in the applicant's favor, the amount abated will be repaid with interest.

In Kansas, the tax commission assesses the tax and sends a certificate of its findings to the probate judge, the county treasurer, and the persons who are to pay the tax. In each state it is necessary to consult the local statutes to know the exact procedure prescribed. The federal tax is assessed by the Bureau of Internal Revenue.

§ 258. Appeals from Assessment

Methods of appealing from the assessment of tax are provided by both state and federal legislation. In New York, either party may appeal and the appeal is first to the surrogate himself from the *pro forma* order. Notice of appeal must be filed within sixty days and must state the grounds of the appeal. This appeal is usually decided on the briefs filed by the attorneys for the appellant and for the comptroller. The surrogate after hearing the appeal may affirm the order, may modify or reverse it, or may direct a further appraisal and supplemental report.

Either party, the state or the taxpayer, may appeal from the final decision of the surrogate to the court above. In all states it is possible to appeal to the higher courts. The question in each case is whether the appeal will justify the costs and the delay incurred. Such proceedings would be controlled

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by the attorneys and would follow the court procedure customary in the state.

§ 259. Payment of State Tax

New York allows a discount of 5 per cent for payment in six months after accrual (time of transfer). An executor should secure this discount if possible. The benefit resulting from it should be given to all persons paying any part of the tax, because otherwise the person receiving the residue of the estate would be enriched by the amount of the discount at the expense of the other beneficiaries. If the tax is not paid within eighteen months, interest will be charged and collected at the rate of 10 per cent from the time of accrual.

§ 260. Payment of Tax on Land Values

It is the executor's duty to pay the state tax on realty and then collect from those who take possession. The executor may use what he has collected from the personal assets to pay all the transfer taxes on both personalty and realty. Then he may collect the amount of tax he has paid on the realty from those who take the realty. He can, if necessary, bring the proper proceedings in the surrogate's court to have the land sold if the tax is not repaid voluntarily. As he has had no possession of the land he must get a court decree to sell the land to get back the tax paid if the reimbursement is not voluntarily made. This order may be secured in the same manner as an order to sell land to satisfy debts when the personalty is not sufficient.

Under state laws levying the tax on individual legacies the person taking real estate upon which a legacy payable to another is charged, takes it with the burden and must pay the legacy without subtracting anything for the tax; that is, he must pay all the tax from his own interest in the land.

The transfer tax is a lien on real property until paid, save

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that after six years an innocent purchaser for value would hold the property free of liens. Against the heirs or the devisees, the obligation would continue indefinitely because no statutory limitations run against the state.

§ 261. Payment of Tax on Legacies

State laws generally provide that the tax shall accrue immediately after death, and interest begins to run from that date as soon as the amount of the legacy is ascertained. (But see § 267 in next chapter.) Each legacy is liable for the tax due upon it, which the executor must pay, and the legatee is entitled to the remainder. The testator may provide that any or all inheritance taxes shall be paid from the residuary estate. The effect of this is to increase the legacy or legacies by the amount of the tax paid.

A legacy in trust is usually taxed as if it went directly to the objects of the trust. In Illinois this is not the case, and if the trust was a secret one, the tax levied would be as against the trustee individually.

A lapsed legacy pays tax according to its final destination. The usual rule is that when a legatee dies before the testator, the legacy lapses unless it is left to the legatee or his heirs. In some states a legacy will go to the heirs of the legatee if the legatee dies before the legacy vests. Usually a lapsed legacy goes to the residuary legatee or legatees.

§ 262. Responsibility for Payment of Inheritance Taxes

The primary responsibility for payment of the tax upon the transfer of the entire estate, including property which will not come into his possession, rests upon the executor or administrator. Generally, all persons on whom rests the responsibility for payment of the tax are personally liable therefor, and if the executor pays he may compel reimbursement.

Although the executor is generally charged with the duty

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of paying state inheritance taxes, such taxes are borne not by the estate but by the persons who take the property under the will. Consequently, the executor must reimburse the estate by collecting from each person who takes property the amount of the tax on his respective share, deducting this from each legacy and paying over only the remainder. If the legacy is of specific stock or other articles of value, he may retain them until the legatee reimburses him for his advances. From legacies of money, he may deduct the amount of tax paid.

> It is the duty of the personal representative in every case where a tax is due under this act, before paying over any legacy or distributive share, to exact from the person who is to receive it, or retain in his hands out of the legacy or distributive share, a sum sufficient to pay the tax. If he does not he runs the risk of paying it out of his own property.[6]

The New York tax is payable to the state comptroller in all counties when there is a salaried appraiser. In other counties it is payable to the county treasurer. An executor should pay within six months and secure the discount and avoid the penalty. (See § 259.)

§ 263. Special Cases

There are cases where large legacies have been left in pursuance of contract, but in all such cases the state has been able to enforce the usual tax.[7]

In the same way the law does not take notice of compromise among the claimants. The tax accrues at the time of death. What those who are entitled to the property do among themselves does not concern the state. In one case a large amount of property was left to a charitable organization and was exempt. The charitable organization compromised with some of the heirs who brought suit, and paid them one-third

[6] Hunter v. Husted, 45 N. C. 141.
[7] Matter of Owis, 173 App. Div. (N. Y.) 1 (affirmed 223 N. Y. 1).

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of the estate. The court let them take it free of tax as it was not left to them but to an exempt party. In Pennsylvania and Colorado the rule is otherwise.

A bequest to a creditor would be taxable. If made to discharge the debt, the creditor need not accept; if he does, he must pay the tax.[8]

Review Questions

1. Where must a decedent's principal inheritance tax be paid?
2. What courts have jurisdiction over the collection of inheritance taxes? In your state, what officer must enforce the payment of such taxes?
3. What time is allowed for the filing of an inventory and appraisal in your state? Who values the items?
4. When is the value of the property taken to compute the transfer tax? How is the taxable value of real estate and personal property ascertained? How are active stocks valued? How is the present value of life estates, annuities, remainders, dower, curtesy, and the like determined?
5. In your state, who assesses the tax?
6. In your state, what rights of appeal exist?
7. To whom, in your state, is the tax payable? Who is primarily to pay the tax? How can he collect taxes advanced on land? Who must pay the tax on realty? If a legacy is charged on land, must it bear its proportion of any tax on the land? How long is an unpaid inheritance tax a lien on land?
8. When does the transfer tax accrue? Who pays the tax primarily? How is a legacy left in trust usually taxed? How is the tax assessed on a lapsed legacy?
9. Who is responsible for the payment of inheritance taxes? How is the estate reimbursed for taxes paid on legacies?
10. If legacies are left pursuant to a contract, would that affect the tax? If the heirs compromise, does it affect the tax? Would a bequest to a creditor be taxable? Is a gift to take effect at death taxable?

[8] Matter of Gould, 156 N. Y. 423.

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CHAPTER XXXII

DEDUCTIONS AND EXEMPTIONS

§ 264. Deductions

Under the state laws certain deductions are made, which reduce the tax paid the state by reducing the amounts paid the residuary legatees. These deductions usually include the following:

1. Funeral and burial expenses
2. Allowances to family
3. Taxes due at time of death
4. Administration expenses
5. Expenses of necessary litigation
6. Claims against the estate

§ 265. Funeral and Burial Expenses

Reasonable funeral and burial expenses may be deducted, it being considered that public policy dictates that every deceased person should be buried in a way suited to his former station in life.

The amount paid for funeral expenses is subject to the approval of the court, the law prescribing merely that it must be reasonable in view of the circumstances of the case. If only the rights of legatees or heirs are involved, the rule is liberal, usually to the extent of allowing a monument or tombstone. But if the rights of creditors are affected, the courts often require that the funeral be plain and that there be neither monument nor tombstone. Funeral expenses include the undertaker's bill, the cost of the cemetery lot, and a suitable tombstone, and the cost of funeral services fitting to the station and

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religious faith of the deceased. They sometimes include an allowance for mourning to be worn by relatives of the deceased.

It will be seen that there is no positive rule as to what is to be considered reasonable. In a case in Iowa the testator directed that $2,000, about one-third of his entire estate, be expended for a tomb and funeral expenses. The officers of the state objected to the deduction, "for the reason that it is of a purely personal and selfish nature," but the court sustained it as a lawful deduction.[1] Another court might well hold that such a proportion was entirely unreasonable.

§ 266. Allowances to Family

In most if not all of the states, certain property and usually some amount of ready money is set aside by law for the use of the widow and minor children. Whatever the statute allows for this purpose is deducted from the amount of the estate subject to transfer taxes. The specific articles must be set aside. Their value cannot be taken and deducted, and if they do not exist, no allowance or substitution is made. In New York, domestic animals and their food for sixty days are allowed. Few families are benefited by this provision at this time. No legislature has as yet in its wisdom allowed the bereaved family a Ford car and gasoline enough for three hundred miles.

§ 267. Taxes Due at Time of Death

All taxes due at the time of death that would be valid claims against the decedent had he lived are to be paid as preferred claims and are allowed as deductions from the taxable estate. (See Chapter XXVI, "Paying Taxes Due.")

In some states, e.g., Connecticut, Illinois, Minnesota, and New Jersey, the courts have decided that the amount due the

[1] Morrow v. Durant, 140 Iowa 437.

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United States under the present federal inheritance tax law may be deducted. In New York it has been decided that the federal tax cannot be deducted.[2] In Pennsylvania the courts decided that it could be deducted, but the legislature in 1919 declared that it was not to be deducted. The matter is in most states still uncertain. (See § 341.)

Inheritance taxes levied in states other than the state of residence are allowed as deductions in some parts of the country. The highest court in New York refused to allow as a deduction the inheritance tax imposed by another state and the appeal of the executor was dismissed by the Supreme Court of the United States.[3]

§ 268. Administration Expenses

All legitimate expenses of administration are to be deducted, including reasonable fees to counsel. There should be a certain proportion between the fees paid the counsel and the amount of the estate. Counsel fees may be estimated and allowed in advance by the appraiser.

The commissions paid executors can be deducted to the extent that they are allowed by law. Where a bequest is made to an executor in excess of his legal commission, the excess is taxable. (See also § 340.)

§ 269. Expenses of Necessary Litigation

When executors have to fight a will contest, the expenses of such litigation are necessary and are properly to be deducted. In a case in Illinois the will was contested and the executors expended over $12,000 in defending it. This amount was allowed to them as a proper deduction, the amount involved being large. Other legatees interested in sustaining the will spent a like amount in employing counsel to assist but they

[2] Matter of Sherman, 179 App. Div. (N. Y.) 497.
[3] Matter of Penfold, 216 N. Y. 171.

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were not allowed to reimburse themselves from the estate.[4] Generally, litigation by the heirs is at their own cost and is not allowed as a deduction.[5]

§ 270. Claims Against the Estate

Any inheritance tax is levied on what remains after all debts have been paid, all expenses of administration paid, and the net value ascertained. The process of assembling claims has been described. (See Chapter XIV, "Assembling Claims and Paying Debts.")

In New York and many other states, a legacy left to one who had a claim for services is taxable only on the excess above the legal claim. In other words, the claim is deductible from the estate before an inheritance tax is computed.[6]

In the settlement of the estate of Jay Gould, a legacy of $5,000,000 to George Gould in payment for services rendered his father, extending over twelve years, was allowed as a deduction and made free of tax by the appellate division.[7] The dissenting opinion of one judge was based on the ground that the legacy exceeded the legal claim, which was the fact. The case was taken to the court of appeals and reversed.[8]

Partnership debts are to be paid from partnership assets and so diminish the value of the partnership interest, but in no case are they to be deducted from the individual estate unless the firm is insolvent.

§ 271. Usual State Exemptions

The usual exemptions under the state laws are:

1. Amounts under some maximum, usually $5,000 to $25,000, going to husband, wife, children, and other

[4] Connell v. Crosby, 210 Ill. 380.
[5] Lines' Estate, 155 Pa. St. 378.
[6] Matter of Enos, 61 Misc. (N. Y.) 594.
[7] Matter of Gould, 19 App. Div. (N. Y.) 552.
[8] Matter of Gould, 156 N. Y. 423.

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near relatives. In some states amounts going to the immediate family are wholly exempt.

2. Amounts under some maximum, usually $500, going to more distant relatives and strangers to the blood.
3. Legacies to charitable, religious, and educational corporations incorporated in the state of domicile.

"Children" would include formally adopted children but not stepchildren. In New York by statute "children" may include those standing in the mutually acknowledged relations of parent and child. This statute at times causes troublesome litigation.

In New York at the present time bequests to foreign charitable corporations are exempt.

The federal law taxes the estate as a whole and exempts all estates below $50,000 in value. (See Chapters XXXVII and XXXVIII.)

Review Questions

1. What deductions are made from the body of the estate under the state laws? Which legatees are affected by these deductions?
2. Who decides whether funeral and burial expenses are reasonable?
3. What is the allowance to the family in your state?
4. What taxes are allowed as deductions from the taxable estate in your state? In your state can the federal tax be deducted?
5. What are included in expenses of administration? If the estate totalled $100,000 and there was no litigation or special intricacy, what should counsel fees approximate?
6. When are expenses of litigation allowed? What factor would affect the amount so allowed?
7. What are valid claims against the estate? Can heirs or legatees have claims allowed for actual services rendered?
8. What are the exemptions in your state? Are adopted children accounted as children? What is the general exemption in the federal law?

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CHAPTER XXXIII

INVENTORIES

§ 272. Importance of Inventory

For a number of reasons, the inventory is one of the important records of the estate. The figures shown on it are the basis for the initial entries on the books of the estate. The commission of the personal representative is often based on it and assets transferred by the executor to the trustee are transferred at the inventory value.

In his reports to the court as to progress in realizing on the assets of the estate, the personal representative must account for the inventory valuation. Of course, he in no way guarantees that this valuation will be realized, but he is required to account for that valuation either as realized, yet to be realized, or incapable of realization—in other words, loss on realization.

As has been said (see § 102), the will sometimes asks that the executor be excused from filing an inventory, but this request results from a mistaken sense of the essentials. There can be no adequate accounting system without the inventory, for this, in a condensed form, makes the substance of the first entry in the books of account. In most states an inventory is required by law as an adjunct of the inheritance taxation. When any transfer tax is to be paid, it is of course necessary that an inventory be drawn up, and for many reasons it is desirable that the executor prepare an inventory and file it with the court.

An inventory fixes *prima facie* the number and the value of the estate's assets, and any person who claims that estate

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assets were omitted from the inventory or were incorrectly valued in it, has the burden of establishing the truth of his claim. If no inventory were filed, such a person could put upon the executor the burden of establishing the fact that the executor had accounted for all the estate assets at their true valuation.

§ 273. The Inventory the Basis of Accounts

The inventory of the personal property of the estate is the basis on which all the accounts are established, although frequently the accounts must be started before the inventory can be completed.

In the form of report adopted by many states the expression used is that the "accountant charges himself" with the amount of the inventory. It must be understood that in this instance the word "accountant" is not used in the professional sense, but rather in the sense of the person who is making an accounting for his stewardship to the court. He charges himself, as executor or administrator of the estate, with the responsibility for the ultimate delivery to the heirs of the realization value of the amount of the inventory.

It seems almost needless to say that the administrator is not personally the gainer by any realization in excess of the valuation given on the inventory, as this is profit on realization and is the property of the estate.

§ 274. Time of Filing Inventory

The inventory must usually be submitted within three months of the date of qualification of the personal representative, but it is always wise to prepare and file it as soon as is possible. The personal representative is not always able to submit a complete schedule within the legal time limit, as assets may be discovered even long after the affairs of the estate have been wound up. In the case of the discovery of further

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assets during the administratorship, the personal representative becomes liable for a proper accounting for the additional values, although in most states he is not required to file additional inventories.

It is usually the duty of the executor or administrator to prepare and file the inventory. In New York he may have appraisers appointed by the court to appraise the assets. It is simpler in New York to let the transfer tax assessor make the entire inventory and appraisal. In Massachusetts, on the contrary, the executor or administrator must prepare a full and complete inventory within three months after appointment and file it for the tax commissioner to base the tax assessment upon it. The general rules in Massachusetts are as follows:

> The inventory is in two parts, one dealing with real estate, and the other with personal property. The schedule of real estate should include all of the real estate which the deceased owned within the commonwealth. The schedule of personal estate should include all personal property situated within the commonwealth, such as goods, chattels, claims, money in the bank, stock, bonds, etc. So far as practicable each item should be listed and appraised separately. In the matter of household furniture, clothing, bric-a-brac, etc., it is not customary to list all the articles separately, but to value them in a lump. This practice should, of course, give way in any case where the individual pieces of furniture or jewelry are of unusual value; also any articles specifically bequeathed by the will should be separately appraised. In ordinary cases, however, a general value set upon such articles in a lump will be sufficient. It is very important, under the inheritance tax law, that the appraisal of bank deposits, notes, claims, etc., should include interest up to the date of the death of the deceased. Also, the value fixed should always be the value as of the date of the death of the deceased. Ordinarily, real and personal property situated in another state or country need not be included in the inventory, although the Tax Commissioner may require information concerning it. Goods or money which chance to be

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in the possession of the deceased at the time of his death, but which do not belong to him, should not be included.[1]

In each state the special procedure and forms would have to be followed.

§ 275. Inclusion of Real Estate

The general adoption of laws imposing transfer taxes (see Chapter XXIX) has made desirable many changes in the ordinary procedure in regard to inventories.

The old rule in most states was that the inventory should include only the personal property of the decedent, because the real property passed under the law, without the intervention of the executor, either to the devisees or to the decedent's heirs if he made no disposition of it by will. Some states, however, require that the realty be separately inventoried, especially in cases where a will provides that it or the proceeds from its sale are to pass to the executor to be held in trust (compare § 274), but not all such states require the placing of a valuation on the real property.

But as all state and federal inheritance tax laws require that real estate be included in the inventory, it is necessary to include the values in all schedules for this purpose. The determination of this value can most conveniently be made at the same time and by the same officers as make the other appraisals, and the inclusion of the real estate in all inventories tends to completeness of the records.

§ 276. Inclusion of Accruals

In some states it has been considered proper to include in the inventory the accrued income to the date of appraisal, but this is nowhere required and is not a good practice, as it causes an additional complication. On the contrary, because of the transfer tax laws, it is proper to include accrued rent, inter-

[1] Newhall, Settlement of Estates in Massachusetts, p. 57.

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est, and similar items, only to the day of death. The federal regulations require that all such accruals to date of death be shown in the return for estate tax:

> Rent which has accrued upon real property at the time of the decedent's death, whether then payable or not, is included in the gross estate. The amount of interest accrued upon bonds on the day of death, whether payable then or subsequently, should be included. All matured coupons, whether presented for payment or not, should be included.[3]

§ 277. Assets of No Value or Doubtful Title

If the personal representative should find among the assets of the estate a security which he knows to be valueless, he must still include it in the inventory. It is property of the estate, and must be inventoried and retained. It may later become valuable, in which case he will have to account for it. The appraised value of an asset considered absolutely worthless should be shown as "No Value."

If the court orders the representative to distribute such an asset, he should make the proper entry in his books of account, although the entry will show no money values.

The value of notes or other claims held by the decedent should be included, though they were canceled by his will or appear from their dates to be barred by the statute of limitations. (See § 296.)

Assets the title to which is uncertain should be included in the inventory "on their merits," stating all the known pertinent facts, and leaving the question of ownership to the court. Such assets may include securities found in the possession of the decedent but standing in the names of other persons, joint deposit accounts, articles on which it will require the court's decision to settle whether they are personalty belonging to a tenant or fixtures attached to realty, etc.

[3] Article 15 of Regulations 37, Bureau of Internal Revenue.

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§ 278. Articles Reserved for Decedent's Dependents

Where the appraisers are empowered to reserve the necessary household articles for the use of the decedent's dependents, it has always been the rule that these be included in the inventory but that no value be assigned, the articles being marked "Reserved." This rule too is vitiated by the transfer tax, for such articles are not always an allowable deduction.

§ 279. Summary of Inclusions

By letting the inventory include everything belonging or accrued to the decedent at midnight on the date of death, and nothing else except assets of doubtful ownership (on which the court will pass), the inventory will include the gross corpus of the estate (see Chapter XXXV, "Corpus and Income"), and will contain the data needed for both state and federal reports as to the amount of the estate at the date of death. This is the best practice where the state law is not mandatory to the contrary.

All bonds, whether federal, state, or municipal, and whether or not containing a tax free covenant, should be included.

Unless the law of the executor's state requires him to file, together with the inventory, a statement of the debts due by the decedent, the inventory should make no mention of such debts. A separate schedule such as that described in § 281 is usually available for the ascertainment of debts.

§ 280. Forms of Inventory

The inventory should always be prepared under the general guidance of an attorney, unless the executor is thoroughly familiar with the local probate law or has employed an accountant who is. The rules vary in different states, but the form of the inventory is, except as to the certificates accompanying it, not usually specified in the law. In each state the clerks of the probate courts are usually supplied with blank

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forms following the special statutory provisions of the particular state. An outline of the form used in Maine is given. (See Form 17.)

§ 281. Schedules

Each of the classes into which the inventory is divided should usually be made the subject of a separate "schedule." The schedules should be numbered serially for convenience in reference.

When the statute does not specify the classes into which the property is to be divided, judgment should be used as to the degree of segregation. For example, while in a very small estate it might be well enough to lump bonds and corporate stocks, or secured and unsecured notes, in a large estate it might be desirable to separate each of these into several classes, as perhaps: bonds taxable; and bonds non-taxable.

The schedules most commonly used are:

Household Chattels
Bonds
Stocks
Cash in Banks and on Hand
Real Property
Interests in Businesses and Partnerships
Debts Due the Decedent

Under Household Chattels are usually included furniture, carpets, pictures, ornaments, jewelry, silverware, chinaware, pleasure vehicles and horses, clothing, and similar articles.

The schedule of Debts Due the Decedent should classify the items into: (1) *Sperate* Debts (from the Latin word for hopeful), (2) Doubtful Debts, and (3) *Desperate* Debts (from the Latin word for hopeless), each being valued at the time of appraisal on the basis of probabilities of collection. *Sperate* debts are those on which 100 per cent is expected to be realized;

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desperate, those on which nothing is expected. Others are doubtful. Secured notes receivable, such as mortgage indebtedness, are sometimes excluded from *sperate* debts receivable and listed in a separate schedule. In any event the security should be specified.

§ 282. Amount of Description Required

The description given of the assets should be such as will identify them reasonably, not as against all other similar articles everywhere, but as against other articles in the inventory. "Four chairs" would not be an adequate description in an inventory which listed many other chairs, but "four dining-room chairs" might.

> A room by room appraisal is desirable; and all the articles should be named specifically, except those of small value, such as common bric-a-brac or cheap books. A separate value should be given for each article named, except that the values of a number of articles contained in the same room may be grouped. The value of an article worth more than $50 should be stated separately. Such an entry as the following would be acceptable:
>
> Dining room: Table, six chairs, three pictures (common print), value $75; sideboard, $60; total, $135.[3]

The federal regulations require also that the description of articles having marked artistic value, such as paintings, engravings, etchings, statuary, oriental rugs, or antiques, be fully given.

> Where paintings having artistic value are listed, the size, subject, and artists should be named. In the case of oriental rugs, the size, make, age, etc., should be given. The weight in ounces of each article of silverware should be stated.[4]

This is part of the general rule. The remainder is that the description of articles which can be appraised without a

[3] Article 17 of Regulations 37.
[4] Article 18 of Regulations 37.

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physical examination of the articles, such as stocks and bonds, should be sufficient to give the information necessary for such appraisal, such as: name of issuing company, numbers of certificates, par value, rate of fixed dividend, life, etc.

A business owned solely by the decedent should be inventoried in detail; a business in which he held a partnership interest is entered in different ways, depending somewhat on the partnership agreement as to winding up the affairs in case of death of a partner. In each case the inventory should conform to the facts and should be based on an accountant's statement.

§ 283. Certificate

The certificate as to the accuracy of the inventory and appraisal should always be prepared by the attorney unless there is a form given on the probate blanks issued by the clerk of court, as the requirements vary in the different states. The substance is, however, the same in all.

Review Questions

1. Why is the inventory important? Who must account for the inventory valuation? What weight has the inventory as evidence? How does the accounting depend on the inventory? Why does an inheritance tax necessitate an inventory?
2. Who is charged with the inventory valuation? To whom does any increase in the value of assets belong?
3. How soon must the inventory be filed? In your state, who prepares the inventory? If additional assets are discovered, what is done?
4. Why was the real estate formerly excluded from the inventory? Why has this been changed?
5. To what date should accrued rent, interest, etc., be included?
6. What is the rule as to securities of uncertain value? What should be done with items, the title to which is uncertain?

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7. Can the same inventory be used for both state and federal tax?
8. As of what date should the inventory be taken? What should be excluded? Should debts of decedent be scheduled? What is the rule as to articles reserved for the use of the family?
9. What general effect have the transfer tax laws had on the taking of inventories? What items must now be included? How are allowances to the family entered? Will the same inventory do for both state and federal tax?
10. Who is qualified to prepare an inventory? What is the form? Where may forms be secured?
11. What is a schedule? What schedules are usually prepared? How should debts be classified?
12. How much description is required? What is the rule as to objects of art? How should securities be described? How should a partnership interest be entered? How should a business owned solely be inventoried?
13. Who should prepare the certificate? What is its substance?

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CHAPTER XXXIV

APPRAISEMENT

§ 284. Authority of the Federal Regulations

The items listed in the inventory should be appraised along the lines established by the law of the state, where that is mandatory. When the statute is not compelling, appraisers and administrators will make no mistake in being guided in their valuations by the federal regulations, which are coming to be generally accepted, except in a few particulars, as more nearly sound than any other single compilation. The suggestions which follow are in accord with Regulations 37 of the Bureau of Internal Revenue, which contain the rules under which the federal examiners act.

These regulations have been only partially confirmed by the courts, and it is entirely probable that when appeals are taken from decisions of revenue officers, the regulations may not be upheld in all respects. At present they form a valuable interpretation and should be consulted by all those who are interested in valuations under either state or federal law. The federal rules require that the appraisers' report shall conform to the local form. (See § 302.)

§ 285. Who Makes the Appraisement

The value of the inventoried articles should be determined through an appraisal by disinterested persons. In most states it is possible to have appraisers selected by the court, and in some states it is required that they be so appointed. Whenever it is possible, such appointment is desirable.

When there is no arrangement for securing the services of

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official appraisers, the executor or the administrator is required to value each item as accurately as possible. In many jurisdictions, the probate judge or representative of the state will accept these valuations if no objection is filed and no further appraisal is made. In cases of controversy, the official appraiser or appraisers appointed will examine and report on the values.

> The valuation which the appraisers set upon the assets is ordinarily final. But in cases of errors the executor or administrator is allowed for them in his accounts, and in some cases inventory valuations are subject to review by the Court of Probate.[1]

Small estates may be exempt from tax and from appraisal by motion and affidavit of the executor or the administrator. If, for instance, the exemption for near relatives is $5,000 each and a man's net property goes to his wife and two children, his net estate being $15,000, it is obvious that neither the state nor the federal government has any interest. The judge of probate would have to be satisfied from the affidavit that the assets amounted to no more, and the comptroller or other official representing the state would have to be notified and satisfied as to the truth of the facts alleged.

If a non-resident had been doing business in the state, or had a residence in the state, or for any reason was likely to be held for any tax or to be considered a resident, his executors could ask the probate court of the locality for a waiver as to his estate or any particular assets belonging to his estate that were not liable to taxation. An affidavit should first be filed setting out all the facts, and a waiver might then be had for assets not liable to tax and an appraisal of assets subject to tax, if there were any.

An executor or an administrator should prepare several

[1] Baugh and Schmeisser, Theory and Practice of Estate Accounting.

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copies of his inventory and valuation. A copy is required for the court of probate; an additional copy will be required for the comptroller or other state authority; two will be needed for the United States authorities; and one should be filed in each county in other states in which the decedent did business, owned real estate, had business interests, and where foreign corporations were located in which he owned stock. It is to be noted that the same original inventory and appraisement answers for every purpose.

§ 286. Appraisement by Official Appraisers

Permanent appraisers are appointed in New York by the state comptroller. From these the surrogate will, on his own motion or petition, designate one to act in any particular case. In some counties the county treasurer is empowered to act as appraiser. In some cases the surrogate himself may act. In Massachusetts, the tax commissioner appraises the property and also assesses the tax. In California, the state comptroller appoints permanent inheritance tax appraisers, and the superior court having jurisdiction of the estate will designate one or more of these to ascertain and report the tax due on the estate. In Connecticut the probate court appoints two or more disinterested persons to appraise the property. In Delaware, the register of wills acts as appraiser. It will be seen that the process of securing appraisers varies widely, and in each state the local procedure must be ascertained and followed.

§ 287. Qualifications of Appraisers

An appraiser should be a man of intelligence and experience. He should have knowledge of the laws of his state relating to trusts, wills, and the course of descent and distribution. He should be an expert in the values of such property as he appraises. He should be able to conduct examinations of

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witnesses and to judge as to questions of residence, relationship, etc.

In these days an official appraiser called upon to value the assets of a large estate should have knowledge and experience in matters of law and business, and should be able to render an intelligent report back to the court. He has power to issue subpoenas and examine witnesses. His powers and duties are semijudicial. "They call for the exercise of some judgment, discretion, and knowledge of legal principles. They demand of the incumbent an understanding of statutory provisions and an ability to pass upon complicated questions of law." [2]

> Where expert appraisers are to be employed, care should be taken to see that they are men of recognized competence with respect to the particular class of property involved. In order to facilitate the acceptance of the appraisal, appraisers should be employed whose competence is well established.[3]

§ 288. Notice of Appraisal

Every person interested in the appraisal, among whom should be included all beneficiaries or legatees, is entitled to reasonable notice of the time and place of the appraisal. When the will is probated or when letters of administration are granted, all parties in interest are notified, and the parties entitled to notice of the appraisal would be included in the list then used. The appraiser's report should state that due notice, as prescribed by the local statutes, was given to all persons entitled to notice.

§ 289. Procedure at Appraisals

The evidence presented as to value of property, as to the estate's ownership of particular property, and as to relationship of persons to the decedent, may be in the shape of

[2] People ex rel. McKnight v. Glynn, 56 Misc (N. Y.) 35.
[3] Article 19 of Regulations 37.

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affidavits or oral. The appraiser may subpoena corporate books when there is no other way to prove the value of stock.

§ 290. Ascertaining Values—General Rules

The transfer tax is computed on the value of the property at the time of death. Generally speaking, the price which can be secured for articles of personal property at a *bona fide* sale is the figure which should be inserted.

> The value at which property included in the gross estate is to be returned for [federal estate] tax purposes is the value at the time of the decedent's death. Neither depreciation nor appreciation in value subsequent to the date of death is considered. The value to be ascertained is the market, or sale, value of the property. The highest price obtainable for the property within a reasonable period of the decedent's death is the value to be included. A sale of the property, however, in order to be accepted as the criterion of value, must be made in such manner as to insure the best price obtainable under existing circumstances.[4]

The price realized from a sale cannot be used as determining the value for federal estate tax purposes: (1) unless the sale was made as a matter of business, and not merely in order to establish value; (2) unless it was made in absolute good faith, with a view to realizing as high a price as possible; and (3) unless reasonable care and skill were exercised to obtain such high price.

> If individual sales of property are better adapted to procure a good price than auction sales, the price obtained at an auction sale will be accepted only after reasonable effort to find individual purchasers has been made.[5]

§ 291. Ascertaining Value of Real Estate

Real estate is not appraised at its tax valuation but at its market value. This is not to be its value at a forced sale. On

[4] Article 14 of Regulations 37.
[5] *Ibid.*

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the contrary, a sworn appraisal by an expert appraiser is required. If real estate has been sold, under the conditions set out in § 290, within a reasonable time after the decedent's death, the sale price will govern.

> Where no sale has been made, the criterion of value is the best price which could have been obtained within a reasonable period of the decedent's death. . . . The assessed valuation should be considered, but is not conclusive. All relevant facts and all elements of value should be considered in every case.*

A cemetery lot owned by the decedent is part of his gross estate, but its value is limited to the salable value of such part of it as is not designed for the interment of the decedent or members of his family.

§ 292. Ascertaining the Value of Stocks and Bonds

The value of stocks and bonds listed upon a stock exchange must for federal estate tax purposes be obtained by taking the mean between the highest and the lowest sale price upon the day of death, provided the sales were made in the regular course of business, and not for the special purpose of establishing value. This provision is manifestly unfair, as while one sale may have been made at an exceptionally high or low price, all other sales may have been normal. A weighted average would be more just.

If there were no sales upon the date of death, the price nearest to that date, and within a reasonable period thereof, either before or after death, must be taken.

If the stock is not listed upon an exchange, but is dealt in actively by brokers or has any other active market, the latest sale price prior to the day of death will govern.

In the valuation of stocks, care should be taken to see that a dividend declared but not paid is not twice included in the

* Article 15 of Regulations 37.

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amount of the estate; that is, if the dividend is shown as a separate asset, the value of the stock "ex-dividend" should be given.

The valuation of stocks not usually sold on the open market, such as those of close corporations, depends in part on the value of the good-will, an element which enters into the valuation of partnership interests also. Since a true market value cannot be obtained by an examination of selling prices, the worth of the corporation is obtained by adding the value of the good-will or earning power of the company to the amount of the net assets. The value of the total thus obtained, divided by the number of shares of participating stock outstanding, is the value per share.

In appraising inactive stocks and stocks of close corporations, dividends paid, private sales, opinions of experts, and value of property held, may all be considered.

§ 293. The Value of Good-Will

Good-will is in the nature of things an element of a going enterprise only, and a business to get the benefit of it must be continued. The rules for computing the value of good-will are to some extent flexible. The net profits of the business are taken for three or more years prior to the date as of which the value is desired. Five is the number for federal estate and corporation capital stock tax purposes. These profits are then averaged. From this average profit is sometimes deducted interest on the invested capital, and in a partnership the reasonable value of the services of the partners, if salaries for them have not been charged against profits. What remains is the annual value of the good-will. This is to be multiplied by the number of years it may continue. Three years is the usual time taken in New York State practice, but when the business has elements of permanency, a longer time should be taken. In valuing the good-will of the famous jewelry

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house of Tiffany and Company, a New York court held that the annual good-will should be multiplied by ten. Tiffany and Company had been established for more than sixty years, and the good-will was likely to exist for a long time.[7]

In the Matter of Ball, 161 App. Div. (N. Y.) 79, the court settled the matter by saying that there were three facts that entered into the analysis of business profits in order to ascertain the value of the good-will:[8]

1. The interest on capital invested.
2. The personal services of the partners.
3. The amount of profits for which the good-will is responsible.

In the business in which the decedent, Ball, was interested, he owned the greater portion of the invested capital. The profits for the last year before he died were cut down because of a removal, so the court fixed five years as the period to be taken, and Ball's share of the annual profits averaged in round numbers, $81,500. From this was deducted $7,000 interest on his share of the investment and $30,000, the rather high figure allowed for his personal services to the business. This left $44,500 as the annual value of the good-will. At three years' purchase this came to $133,500. On this amount the transfer tax was calculated.

In the Matter of Keohon, 60 Misc. (N. Y.) 508, the decedent had conducted a trucking business for fifteen years. The net capital invested was $30,600. The average annual profits for two years were..... $26,600
from this was deducted decedent's salary..... 5,000

leaving $21,600
from this was deducted 6 per cent on investment.. 1,836

[7] Matter of Moore, 97 Misc. (N. Y.) 238.
[8] Good-will is always a debit, speaking in accounting terms.

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annual value of good-will	$19,764
three years' profit	3
taxable value of good-will	$59,292

In determining the value of the capital stock of corporations, the Bureau of Internal Revenue seems inclined to consider six years as the minimum life of good-will, although the Bureau, instead of multiplying the net earnings by a number of years, capitalizes:

> . . . the average annual income on a percentage basis that fairly represents, under the conditions obtaining in the trade in the locality, what representative enterprises must earn in order to maintain their stock at par. In other words, if enterprises engaged in a similar business must on the average earn 12 per cent on their issued capital stock to keep the value of their stock at par, the net income should be capitalized by dividing it by .12.[9]

But for estate tax purposes the regulations say:

> Return should be made upon the basis of the value of the stock, as evidenced by the clear value of the excess of the assets of the corporation over its liabilities, and its earning capacity for the five years preceding the death of the decedent. Where the earnings of the corporation have been greater than a fair return on its invested capital, computed according to the nature of the business, there should be added to the net value of the other assets of the business the value of the good-will, computed in accordance with sound accounting principles. Where the earnings of the corporation have been less than a fair return on the invested capital, if the difference is material and the decreased earnings affect value, the net worth of the corporation as disclosed by its balance sheet may be adjusted on a reasonable basis to allow for this decreased value.[10]

The good-will is to be computed "according to sound accounting principles." In other words, every case must be

[9] Form 707, Bureau of Internal Revenue.
[10] Article 15 of Regulations 37.

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decided on its merits, and the examples given above cannot be considered conclusive, but only as showing what has been held under various conditions.

§ 294. Valuing Partnership Interests

The title to partnership property is in the surviving partner. The executor takes the deceased partner's interest in the surplus. To value such an interest requires the same procedure as to value close corporation stocks. A partnership agreement as to the value of each partner's interest would bear weight, but would not be conclusive. The books may be examined by an accountant whose report would give a basis for accurate appraisal. A partnership interest is personal property.

In this country real estate belonging to a partnership is, for all firm purposes, treated as personal property, but if in case of death there should be a surplus, it would be treated as real property and would go to the heirs. That is, it is considered as personal property only so far as need be for the partnership purposes. There are cases, however, where it has been provided in the partnership articles that all real estate is to be considered as personal property. In such cases the manifest intention would prevail, and the real estate itself and the proceeds when sold would be considered as personal property, and in case of death of a partner would be distributed as personal property. The same rules would apply to the assessment of inheritance taxes.[11]

The worth of the business, then, is the value of the other net assets plus the value of the good-will, and the value of each partner's interest is his proportionate share of that worth.

The good-will is an asset of the firm, and the estate of a partner who has died is usually entitled to its proportion and is liable to a transfer tax on its value.

[11] Barney v. Pike, 94 App. Div. (N. Y.) 199; Darrow v. Calkind, 154 N. Y 503.

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Care should be taken to arrive at an accurate valuation of any business in which the decedent was interested, whether as partner or proprietor. A fair appraisal as of the date of death should be made of all the assets of the business, tangible and intangible, and the business should be given a net worth equal to the amount which a purchaser, whether an individual or corporation, would be willing to pay therefor at a normal sale in view of the net value of the assets and the demonstrated earning capacity. Special attention should be given to fixing an adequate figure for the value of the good-will of the business in all cases where the decedent has not, for a fair consideration in money or money's worth, agreed that his interest therein shall pass at his death to his surviving partner or partners.[12]

§ 295. The Value of Growing Crops

The opinion of those expert in such matters should be ascertained as to what a growing crop was reasonably worth, as such, on the day of death, this value being determined by the amount of work yet to be done on the crops, subsequent yield, and crop prices.

§ 296. Notes and Accounts Receivable, Claims, Judgments, Etc.

Notes, whether secured or unsecured, will be presumed to be worth their full face value, plus accrued interest to the date of decedent's death, unless the executor establishes the right to return them at a lower valuation. Interest should be computed upon the basis of 365 days to the year. In the case of an unsecured note it must be shown by satisfactory evidence, in order to justify failure to include it, that the note is uncollectible, either in whole or in part, from the maker or other parties to the note, on account of the insolvency of the parties thereto, or other cause. Where the note is secured it must also be shown that the security is insufficient to satisfy it. Where a note appears to be barred by the statute of limitations its value must be included in the gross estate in the absence of proof that the liability has

[12] Article 15 of Regulations 37.

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not revived by promise to pay or part payment, and also that the parties liable refuse to pay the debt and intend to assert the defense.[18]

The above regulations put on the executor the burden of proof in omitting bad accounts from the inventory. Such proof is usually not difficult to obtain, and in fact should be obtained by the appraisers if they are conscientious in rating the receivables of the estate. A fair valuation for each asset of this character at the time of death should be fixed by the executor, according to the best information available to him at the time of making return.

A right of action which died with the decedent should not be included.

§ 297. Cash on Hand or on Deposit

Bank deposits should be returned at the amount for which the bank would be liable if the deposit were withdrawn upon the date of the decedent's death. The amount of cash must not be reduced by the amounts of checks issued against the decedent's account but not yet cashed, but the amounts of the claims covered by these checks are deductible from the gross estate in the same way as are other liabilities.

Interest which the bank agreed to pay upon condition that the money remain on deposit after the decedent's death, should not be included.

Cash on hand must of course be valued at its face, except that exchange may be deducted from the par of foreign coins.

§ 298. Valuing Household and Personal Effects

All household and personal effects must be carefully appraised, nothing being omitted. No distribution of such effects may be made before detailed lists in duplicate, properly sworn to, have been filed with the federal collector, and suffi-

[18] Article 15 of Regulations 37.

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cient time given the Bureau of Internal Revenue to have its own appraisal made if it is not satisfied with the return prescribed by the state.

> Where it is desired to distribute or sell all the property in advance of the filing of the return, the lists and affidavits should be filed with the collector, together with a letter stating when it is desired to effect distribution. If personal inspection by an internal-revenue officer is not deemed necessary, a waiver of such examination will be sent to the executor, who may thereupon proceed with distribution.[14]

If the personalty includes jewelry or like articles, except in cases where the value of these items is insignificant or includes articles having marked artistic value, such as paintings, engravings, etchings, statuary, oriental rugs, or antiques, appraisals by reputable dealers or expert appraisers of such articles are required.

> The basis to be employed in appraising articles of this character is what they would bring at a bona fide sale to individual purchasers, to dealers, or upon a well-advertised auction sale. If there has been an actual bona fide sale, the amount received may be returned as the value of the property. Where property is valued by legatees for purposes of distribution, such value will not necessarily be accepted. The original cost of the articles is not necessarily a proper basis, on account of depreciation or appreciation of value.[15]

In addition to the lists, the executor must furnish in duplicate his affidavit as to their completeness and the qualifications of the appraisers.

In case of household and personal effects having a value of more than $2,000, it is provided by the federal regulations that the detailed lists must be "prepared by professional appraisers of recognized competence, or by dealers in the par-

[14] Article 16 of Regulations 37.
[15] Article 19 of Regulations 37.

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ticular classes of personalty involved." If these effects, however, have a value of less than $2,000, the detailed lists may be prepared by the executor personally, or he may furnish as an alternative a sworn estimate in duplicate of the approximate total value of the property, by a professional appraiser of recognized standing and ability, or by a dealer in the class of personalty involved.

§ 299. Appraising Patents, Trade-Marks, and Copyrights

> The basis for valuation of intangible assets of this character is the present worth of the estimated future earnings of the exclusive right during the rest of its existence. The returns received by the decedent should be considered in estimating the future earnings.[16]

It is believed that what has been said about good-will and what is later said about the calculation of present worths of annuities (see § 325), will make clear the method of valuing such intangibles. In practice they are often included with good-will, but this cannot be considered wise.

§ 300. Insurance

Proceeds of insurance policies over $40,000 in amount are subject to the federal tax, and are to be valued at the amount actually received by the executor or the beneficiary. In cases where the proceeds of a policy are made payable to the beneficiary in the form of an annuity for life or for a term of years, it is required that the present worth of the annuity, computed as prescribed in § 324, be included in the gross estate.

If the insurance contract gives an option to receive a fixed sum of money in lieu of an annuity, the regulations at present in force do not allow this sum to be used as the value of the policy unless such option is accepted. If accepted, however, it must be so used.

[16] Article 15 of Regulations 37.

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If there are several options, none of them being convertible, it is required that the value of the insurance be determined in accordance with the options exercised.

The states do not tax insurance unless it is for the benefit of the estate.

§ 301. Valuing Other Property

> With respect to all other tangible property the executor should endeavor to arrive at the sound and actual value at the day of death.[17]

The foregoing sentence, indeed, gives the principle on which all estate appraisement should be based.

In many cases it is necessary to ascertain the present value of life estates, annuities, remainders, dower, curtesy, and the like. In most cases this would be referred to expert accountants to work out by the mortality tables and the prevailing rates of interest. (See Chapter XXXVI, "Annuities, Life Estates, and Remainders.")

§ 302. Report of Appraisers

The report of the appraiser or appraisers should conform to local forms. It should contain a resumé of all the facts, a copy of the will if there is a will, the issue of letters, the names of the representatives of parties present at the hearing, the place and time of hearing, the notice given, and the valuation of the property, the deductions made, the names of the beneficiaries, and the exemptions and the amount taxable on each legacy.

Review Questions

1. Will the same inventory and appraisement do for both the state and the federal tax? Why are the rules given in the federal regulations helpful?

[17] Article 15 of Regulations 37.

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2. In your state, who makes the appraisement? Who is responsible for having the appraisement made? Are the values found by the appraisers final? What is done in case of small estates not subject to tax? What should be done where a non-resident has assets in a state? How many copies of the appraisal should be made?
3. What is the arrangement in your own state for the appointment of official appraisers? Give the arrangement in some other important state.
4. What qualifications should an official appraiser have? What judicial powers do they have?
5. Who must be notified of an appraisal? Why? How is notice given in your state?
6. What is the procedure in making appraisement? How do appraisers secure evidence?
7. What is the value that should be placed on property at an appraisal? At what time is the value to be taken?
8. How is the value of land ascertained?
9. How is the value of stocks and bonds ascertained? What is evidence of the value of inactive stocks and bonds?
10. What is the usual method of computing good-will?
11. How is a partnership interest valued? How can the good-will pass to the other partners without being taxed?
12. How is the value of growing crops determined?
13. When can bad debts or notes be left out?
14. How are bank deposits entered? Why are not outstanding checks deducted?
15. What is the rule as to objects of art? If the value of household effects exceeds $2,000, who must make the appraisal?
16. How are patents, trade-marks, and copyrights appraised?
17. What is the rule as to insurance policies? What is the amount of insurance that may not be taxed?
18. What is said as to all other property? Where values are complicated, what is done?
19. What forms should guide the appraisers? What should they contain?

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CHAPTER XXXV

CORPUS AND INCOME

§ 303. Corpus and Income Defined

The principal or body of an estate, the whole value of what is actually left by the decedent at the time of death, is in law and accounting called the "corpus" of the estate.

What is afterward derived from or earned on that body, corpus, or principal, is called the "income" of the estate.

Any income accrued at the time of death forms a part of the corpus of the estate.

§ 304. The Distinction Between Principal and Increment

The first inventory rendered by the personal representative is seldom complete, even for small estates. This is, of course, sometimes due to the omission of items completely overlooked, but a very common source of error is in the failure to understand what really constitutes the assets of an estate. Good accounting requires that in all cases the records show what property was left by the decedent, that is, the body, corpus, or principal of the estate, and what is thereafter gained or lost in the handling of the property. When, however, there is a tenancy for years or for life, it becomes absolutely essential to separate the body of the estate as left by the decedent from any later profits or increments, as in such cases one person or group will be entitled to the income and another person or group to the principal.

§ 305. Administration of a Trust Dependent on a Will

When a will leaves certain property to a person as trustee to pay over the income, say, to "my wife Helen Morton for

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the term of her life, and at her death, to pay the principal to my son Alfred H. Morton or his heirs," a trust has been created. Here the distinction between corpus and income is essential and must be kept up from the beginning to the end. The wife would be life tenant and the son would be the remainderman.

In such a case the trustee is under the duty of preserving the principal intact so that there can be given to the remainderman the whole of the property which was intended for him. Consequently the trustee must apply in the most careful manner, all receipts and disbursements that pass through his hands to principal or to income as the case may be, in order that the principal shall not be reduced at the expense of the remainderman or increased at the expense of the life tenant. Questions of importance and sometimes of difficulty arise in this connection. In this chapter some of the most common of these questions are considered.

Whenever a will contains trust provisions, the executor must, from the date of death, distinguish between principal and income, for although in practice the trustee enters upon his administration of the trust only when the trust funds are set aside, the trust provisions relate by law to the date of the testator's death, and the person entitled to the income from the trust is entitled to that income from the date of the death of the testator.

§ 306. Possibilities of Complication

There are numerous complex possibilities in the formation of testamentary trusts:

1. The estate may be held in trust as a whole:
   - (a) The income to go to one person, and the corpus to go to one person.
   - (b) The income to go to several persons proportionately, and the corpus to go to one person.

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(c) The income to go to one person, and the corpus to go to several persons proportionately.

2. Or the estate may be held in trust in several distinct parts:

(a) The income to be divided in accordance with its source, the corpus to go: (1) to one person, or (2) to several persons by parts, or (3) to several persons in common proportionately.

(b) The income to be given to one person, and the corpus to go to several persons by parts.

(c) The income to be divided proportionately between several persons, and the corpus to go to several persons by parts.

It is feasible for a testator to create innumerable further complications of these basic possibilities.

§ 307. The Status of Interest Accrued at Time of Death

> In arriving at the amount of the principal it should be understood that all the property belonging to the testator at the time of his or her death, after payment of all debts owed by him or her at his or her death, forms the principal of an estate.[1]

It may seem to be an easy matter to determine in the case of any particular asset, what amount was left by the decedent, but such is not always the case, and in the different states the laws governing the division between corpus and income are not the same.

For example, take interest received by the estate:

At common law the general rule was that sums of money payable periodically at fixed times were not apportionable during the intervening periods, and a number of court decisions have held that, in the absence of statute or express agreement,

[1] Gottsberger, Accountants' Guide.

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interest payable at stated times on government, state, county, or municipal bonds, or coupon bonds of a railroad or other semipublic corporations, not issued separately for the payment of a specific debt, but usually bought and held by way of investment, was not apportionable between interest dates.[2] The principle followed in such decisions is founded entirely on English authorities and appears not to have been generally followed in this country. The English rule, too, has since been modified by statute:

> All rents, annuities, dividends or other periodic payments in the nature of income shall like interest on money lent be considered as accruing from day to day and shall be apportionable in respect of time accordingly.[3]

Commercial practice follows the latter rule. By common agreement obligations sold between interest dates are almost universally sold at a price stipulated for the obligations, plus interest accrued.

> Bonds are traded in on the exchange "and interest," the purchasing broker paying interest on the principal from the last coupon date.[4]
>
> Interest and similar income is said to accrue from day to day.[5]

The latter rule has also the approval of the authorities charged with the enforcement of the Income Tax Act of Massachusetts,[6] and is followed in federal estate tax procedure.[7]

In other words, whatever interest or rent has been earned ("accrued" in accountancy) up to and including the date of death of the testator was his at that time and hence belongs to the corpus of the estate.

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[2] 22 Cyc. 1484; Dexter v. Phillips, 121 Mass. 178.
[3] 33 and 34 Victoria, Chapter 35.
[4] Todman, Brokerage Accounts.
[5] Montgomery, Auditing Theory and Practice.
[6] Massachusetts Income Tax Instructions, §§ 2004, 2005.
[7] Article 13 of Regulations 37, Bureau of Internal Revenue.

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The above rule does not apply to coupons detached from bonds and negotiated, which, after being detached, become non-interest-bearing negotiable securities.[8]

If such coupons are detached and sold and then resold, they lose their character as interest and become capital.

Since savings bank deposits must remain with the bank during an entire interest period to entitle them to interest, the inheritance tax assessors in some states do not apportion the interest but compute the tax as of the amount of the bank deposit up to the last "interest day" preceding the testator's death. This is done because there is no way of ascertaining that the deposit will remain in the bank until such "interest day" after the death of the testator, and secure interest which could be apportioned, as the executor might remove it before that time.

The increment from deposits in savings banks which do not contract for any definite rate of interest at the beginning of the period, but which at the end of each fiscal period declare a dividend on the amount of deposits which have remained with them during the period, is a true dividend. Like any other dividend, this does not accrue from day to day and is not apportionable. There is some conflict in the law on these points, but the above is the general practice.

§ 308. The Status of Cash Dividends

In the matter of dividends, there is usually in this country, an opportunity for legal argument. Remaindermen who will eventually receive the corpus of an estate which contains preferred or other stock entitled to a dividend at a fixed rate, like to claim that the "interest" accrued to the date of death is an asset belonging to the corpus, and in the case of cumulative dividends there may possibly be some logic in this point of view.

[8] Clark v. Iowa City, 20 Wall. (U. S.) 583.

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The courts have generally held that a dividend declared after death belongs to income, for the reason that the profits of a corporation are the property of the corporation until the directors in their discretion declare a dividend. On the other hand, a dividend declared before death belongs to the corpus, for the reason that, in law, a dividend is considered earned at the date it is declared, even though it may not be paid for some time afterwards.

It is not possible to know exactly the time when profits are made by a corporation and as a general rule corporations keep back surplus profits, paying dividends only at regular intervals, and at times paying dividends from profits of previous years when there are no current profits. The federal rule is:

> Dividends, whether upon preferred or common stock, should not be included [in the corpus] unless actually declared prior to the date of death.[9]

In Pennsylvania and some other states the rule is to apportion income as of the time when it was earned, and to give the life tenant only so much as has been actually earned since the death of the testator.

In the case of an unusual cash dividend (in Wall Street argot "cutting a melon"), a different rule may prevail, for which see the following section.

§ 309. Stock Dividends

Stock dividends should usually be construed to be a part of the corpus, no matter when declared, and accountants who understand the true nature of a stock dividend are almost unanimous in agreeing that this is the correct view. There is no place in this work for a presentation of the arguments on this point, but it seems likely that the view given above will be even more generally followed as a result of the recent

[9] Article 15 of Regulations 37.

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supreme court decision in regard to the payment of income taxes, which stands forth as one of the most important of the decade.[10] As things are, the title to a stock dividend payable to a trust estate with a life tenant and a remainderman very frequently furnishes material for a lawsuit.

In regard to both stock dividends and unusual cash dividends, it has been the general rule in this country:

> . . . that if part of the value so apportioned accumulated before the life interest began, such part would be held to be principal and not income and would be reserved for those entitled to the remainder. The life tenant meanwhile would be entitled to any interest arising from this amount. That is, the court will inquire as to the time when the fund was earned or accumulated, and it will be divided according to whether it accumulated in the lifetime of the testator, in which event it goes to the remainderman, or after his death (the death of the testator) in which event it goes to the life tenant.
>
> In Massachusetts, Georgia, and Rhode Island, a different rule prevails, and all cash dividends whether large or small are regarded as income and belong to the tenant for life. Stock dividends on the contrary are regarded as principal and are held for those entitled to the remainder. The life tenant would, of course, have the income until the life estate terminated.[11]

§ 310. Setting up Accruals on Books

The accountant, in handling estate accounts when there is a life tenant and a remainderman, should, in so far as he is able, set up all accruals when opening the books, but he will probably have to make numerous adjustments to his records thereafter to correct entries made as a result of incorrect information and to pick up omissions. The further fact must be faced, that the line dividing corpus from income is not so plainly drawn as always to be readily apparent, and in many

[10] Eisner v. MacComber, 252 U. S. 189.
[11] Conyngton, Business Law, Vol. II, p. 518.

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cases it requires the court's interpretation of the facts in the particular case to decide for the personal representative to which account credit should be given.

In computing and setting up accruals, the general rule is that the expression "to the date of the death of the testator" means to and including that day, so that items earned and dividends declared at any hour on the day of death are a part of the corpus.

In the case of the death of the life tenant, the decisions are not altogether unanimous, but it is usually safe to apply the same principle, considering all assets held, due, or earned to and including the date of the death of the life tenant, his property and consequently a part of his estate rather than a part of the residue of the original estate left to the remainderman. Of course it is just that the rule should work both ways.

§ 311. Rights to Subscribe to Stock

Another question which not infrequently comes up in connection with corporation stocks is whether the right to subscribe to new issues of corporation stock is corpus or income. Corporations often allow their stockholders the privilege of absorbing among themselves increased issues which are to be floated, and these rights, being transferable, are often very valuable and may be sold. The rule is that the proceeds of the sale of such rights are corpus just as the new issue of stock itself would be corpus if the executor chose to avail himself of the right to subscribe and thus invest idle or less profitably invested funds of the estate.

The representative should sell the right on the best terms possible. If a trustee, he should invest the amount so received, giving the life tenant the income from the investment and holding the principal for the remainderman.

> The right to subscribe for new shares at par upon an increase of the capital stock, which is an incident of the

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ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust fund for the benefit of the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration. In either event the increase goes to the corpus.[28]

§ 312. Distinguishing Between Corpus and Income

It is extremely difficult to give any brief and accurate summary of the conditions which determine whether a certain realization is corpus or income. Perhaps the best way to state it is to say that all the assets that would be included in a true and comprehensive balance sheet for the decedent at midnight following his death are corpus, and that all liabilities that would appear in the same balance sheet must be met out of corpus. To this there must be added the rule that funeral expenses (see § 266) and all the legitimate expenses of administration, from the expenses of probate to those of the final accounting, are chargeable against corpus. The court is the authority as to the propriety, reasonableness, and necessity of all items of expense. (See § 341.) Losses of part of the corpus due to casualty and theft are also deductible from the corpus itself (see § 343), as is also a failure to realize the appraised value of an asset.

The federal transfer tax is, broadly speaking, levied on the corpus of the estate, less certain deductions and certain exempt items. For this reason it seems advisable in this connection to call attention to Chapter XXXVIII, in which the deductions from corpus for purposes of this tax are treated at some length.

If a piece of real estate would be listed among the assets of the estate, that piece of real estate is corpus. No matter at what amount it is appraised or for what amount it is sold, the

[28] Cook on Corporations, Vol. II, § 559.

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proceeds of the sale are corpus. The establishment of some large industry near a farm, years after the death of an owner of the farm, who has included it in a trust estate, may materially increase the value of the holdings above the figure at which they were appraised and entered on the books of the estate, but although that increase is undoubtedly a gain of the estate after the establishment of the trust, yet it is not income to the life tenant, but an increase in corpus. All the assets of the decedent at the date of death are corpus for whatever values may ultimately be realized. But even with this understanding, the line is not always easy to draw.

§ 313. Discharging a Mortgage

It is evident that taxes, water-rents, and mortgage interest accruing after the death of the decedent, will be charges against the income of the estate, being deducted from the amounts to be turned over to the life tenant; it is equally plain that the paying off of a mortgage must be done out of the corpus.

But if the particular piece of real estate on which the mortgage is paid off is not devised to the personal representative for the benefit of the estate in general, and the terms of the trust provide that different life tenants shall receive the income from different specified investments, or if the realty is to go to different legatees upon the death of life tenants, some artificial adjustment must be made in order that the desires of the decedent as to providing for his heirs may be met, because the income is made greater by freeing it from the expense of mortgage interest, while the general corpus is reduced by investing more money in this particular remainder interest. In such cases the courts will often ascertain with the aid of mortality tables:

> . . . the expectation of the life of the life tenant. Then a calculation is made as to the advantages which will arise from his being relieved of the payment of interest on the

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amount involved for the balance of the life estate. If, for example, the encumbrance or assessment which is to be paid off amounts to $10,000 and the current rate of interest is 5 per cent, the share chargeable to the life tenant is the present worth of an annuity of $500 (the interest for a year on the mortgage), for the number of years during which the mortality tables show he is likely to enjoy the increased income.[13]

This rule will apply also when a special or other assessment for local improvements is made, and a similar adjustment is usually sought when realty left in trust for a particular legatee is condemned by public authority after the demise. In this case the proceeds would ultimately revert to the heir named, and provision would be made for the life tenant.

§ 314. Balancing Equities

The tenant for life should receive whatever the income may be from whatever the estate is, and if various obligations incurred by the decedent or forced investments such as special improvements cause changes in the corpus and in its income-producing power, these facts should cause no change in the above rule. But in the long run the matter comes down to one of the equities, and unless the will is explicit to the contrary, the courts endeavor to find a position midway between that given above, which assumes that the decedent wanted the corpus carried on in its exact entirety to the remainderman, and the other stand, which is based on the feeling that the decedent wished the tenant to have a certain and sure income approximating a certain sum but not guaranteeing it.

§ 315. "Taxable Income" Not Synonymous with "Trust Estate Income"

Attention must be drawn to the fact that income as opposed to corpus is not always the same as income for the pay-

[13] Conyngton, Business Law, Vol. II, p. 519.

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ment of federal income taxes. The example given in § 312, in which a gain in the value of real estate is not accounted income for the life tenant, is a case in point. This gain, when realized by sale, is income from an income-tax viewpoint, as it is an increase in wealth over the value at the date of the decedent's death. The tax on this gain will be payable for the year in which the gain is realized by sale. These statements may have to be modified in view of later decisions of the United States courts which indicate that they appreciate the inconsistency of the two conflicting rules and the need for harmonizing them.[14]

§ 316. Proceeds of Insurance Policies

Proceeds of fire insurance policies, whether in the form of premiums returned on policies taken out by the decedent and canceled by the personal representative, or money paid to the personal representative to cover a fire loss on property owned by the estate or on which the estate holds a mortgage, are always corpus.

Proceeds of life insurance policies, payable to the decedent or to the estate, whether received in a lump sum as a result of the decedent's death or due as the last payment of an annuity formerly payable to the decedent, are corpus. The distribution of proceeds of other forms of insurance may be determined on the same principles.

§ 317. Live Stock and Crops

Live stock born after the date of demise are income. Growing crops belong to the corpus when the land has been sold by the decedent with a reservation of the crops. They are income when the land becomes part of a trust for a life tenant. When the land on which they are growing is not to be held in trust, they go with the land.

[14] Eisner v. Mac Comber, 252 U. S. 189.

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§ 318. Miscellaneous Assets

If a will specified that certain gifts made by the testator during his life are to be considered as advances and deducted from legacies, the amounts of such advances are a part of the corpus.

Many partnership agreements specify that the estate of any partner shall be entitled to that partner's share of the profits earned for a certain period after his death. In such case these earnings are a part of the corpus.

There is as yet no fixed rule as to the accrual of royalties, some courts having held that there can be no accrual on this account, while others have approved an accrual of royalties earned prior to the demise. Rents, however, should always be accrued,[15] and where so-called royalties are in the nature of rents, they should be so handled.

§ 319. Effect of Federal Tax Laws

While the federal law establishing a tax on the transfer of estates could have no direct effect on state laws as to what shall constitute corpus and what income, yet the desirability of making the records of the estate consistent has resulted in a more careful drawing of the line even in cases where care to make the distinction was not essential.

Review Questions

1. What is the distinction between corpus and income?
2. In making an inventory, what two reasons make it necessary to distinguish between them? How does it affect a legatee who has only a life interest?
3. Why is the distinction between corpus and income important in connection with the administration of trust estates? What is

[15] Article 13 of Regulations 37.

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meant by a "life tenant"? What is meant by a "remainderman"? What is each entitled to?

4. Why may testamentary trusts be complex? Is it wise to make complex trust provisions?
5. What is the status of interest or rent accrued at time of death?
6. What is the usual rule as to cash dividends? Suppose an unusual cash dividend were declared?
7. What is the situation as to stock dividends?
8. What is the duty of the accountant for an estate in regard to accruals? What is the exact application of the general rule? Does the same rule hold as between life tenant and remainderman as applies in ascertaining the estate for taxation?
9. What is the rule as to rights to subscribe for stock?
10. Is increase of real values after death, corpus or income?
11. If a mortgage is to be discharged, should it be done from income? Why? What adjustments must be made? What is done when special assessments for improvements are made?
12. What do the courts try to do in such cases?
13. Is taxable income the same as the life tenant's income?
14. What is the rule as to proceeds from fire insurance? Life insurance?
15. What is the rule as to live stock and crops?
16. When are advances part of the corpus? When are partnership earnings after the death of a partner part of the corpus? What is the rule as to rents? As to royalties?
17. What has been the effect of the federal tax laws as to distinguishing between corpus and income?

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CHAPTER XXXVI

ESTATES FOR LIFE OR FOR YEARS—REMAINDERS AND ANNUITIES

§ 320. Use of Terms

If a property, a house, shares of stock, or an amount of money, is left by will to a tenant for life or for a certain term of years, the will must also designate who is to take the property when the life interest or the term of years is ended. The estate in the property after the limited tenancy is ended is called the "remainder," and the person taking it is called the "remainderman."

If the property is real estate, the tenant for life or for years is put into actual possession. If, however, the property consists of securities, bonds, or money, it is left to trustees, who hold the property, pay all taxes and expenses, collect interest, dividends, or other profit, and pay the net return to the tenant. Such an estate for life or years gives the right to use or to receive whatever income there may be from certain definite property or a certain amount of money, but these estates may be limited further so as to give the income from the established fund or property only up to a specified amount.

An annuity, on the other hand, gives the legatee an income of a certain amount periodically rather than the indefinite proceeds from a certain amount. It has been defined as "a bequest of a certain sum of money payable periodically for a certain length of time." [1] An annuity, like a life estate and an estate for years, may thus be for life or for a term of years.

[1] Baugh and Schmeisser, Theory and Practice of Estate Accounting.

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§ 321. Taxability of Such Interests

Life estates, estates for years, annuities, and remainder interests, all have values which are taxable. It might seem that all the assets that are transferred are included in the remainder, but state laws consider the bequest of the life interest as a legacy having a separate value and therefore taxable. On the other hand, the bequest of the remainder is not taxed at the full value of the assets because the "present value" of assets not to be received until some date in the future, is not considered as much as the value of the same legacy due immediately.

In New York the taxes on such interests are paid at once out of the body of the estate by the trustee holding the funds, but are ultimately collectible from the tenant, annuitant and remainderman. If it is uncertain to whom the remainder is to go, the tax is computed at the highest rate applicable, and if later it should be found that the remainder passes to someone entitled to a greater exemption, a refund is made by the state.

> The purpose of the statute is not obscure. The purpose is to put at once into the treasury of the state the largest sum which in any contingency the remaindermen may have to pay. The remaindermen do not suffer, for when the estate takes effect in possession there will be a refund of any excess.[2]

In some states the courts suspend payment of taxation on a contingent remainder until it is certain who is to receive it.[3]

An annuity charged against an estate is valued on the basis of the probable duration (as shown by mortality tables) of the beneficiary's life. The tax is then paid at once by the trustee in charge. If the expectation of life on which the tax was based was eight years, one-eighth of the tax would be deducted from the annual payment and added to the residuary

[2] Matter of Parker, 226 N. Y. 260.
[3] Security Trust Co. v. Edwards, 90 N. J. L. 579.

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estate. If the annuitant should die before the tax is repaid, the residuary estate will have to stand the loss.[4]

Future estates are to be valued by deducting the value of the precedent estate, determined by the method and standard of the mortality tables.

§ 322. How Values Are Calculated

The values of all such interests are calculated by the aid of tables used by life insurance companies to determine the expectation of life at different ages. The determination of the values is a problem in actuarial science.[5] The calculations required may be somewhat complex, in which case the services of an actuary or a thorough accountant will be necessary.

The mortality tables used are known as "The Actuaries Combined Experience Table," "The American Experience Table" and "The Carlisle Table of Mortality." In using these tables it is necessary to know which is adopted in the particular state and what rate of interest is used in such computations in that state. The rate for these calculations is not necessarily the same as the legal rate of interest in business transactions.

The tables on pages 324 and 325 are those used by the government, and are taken from Article 20 of Regulations 37 of the Bureau of Internal Revenue relating to estate taxes.

§ 323. Using Mortality Tables

Mortality tables show, on the basis of statistics averaged from many thousands of individual cases, how much longer a person of any age may be expected to live. Knowing this average expectation of life, it is only a matter of calculation to determine the amount that, at a given rate of interest, would be worth as much now to the annuitant or the tenant as the

[4] Matter of Tracy, 179 N. Y. 501.
[5] The standard text on this subject is "The Accountancy of Investment," by Charles E. Sprague.

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TABLE A

Table, Single Life, 4 Per Cent, Showing the Present Worth of an Annuity, or Life Interest, and of a Reversionary Interest

1 Age	2 Expectancy of life	3 Annuity, or present value of $1 due at the end of each year during the life of a person of specified age	4 Reversion, or present value of $1 due at the end of the year of death of a person of specified age	1 Age	2 Expectancy of life	3 Annuity, or present value of $1 due at the end of each year during the life of a person of specified age	4 Reversion, or present value of $1 due at the end of the year of death of a person of specified age
0	23.179	$14.72829	$0.39507	51	17.527	$12.17919	$0.49311
1	30.552	17.30771	.29586	52	16.947	11.88408	.50446
2	35.626	18.69578	.24247	53	16.372	11.58531	.51595
3	37.572	19.15901	.22465	54	15.804	11.28325	.52757
4	38.702	19.41226	.21491	55	15.243	10.97789	.53931
5	39.352	19.55301	.20950	56	14.689	10.66982	.55116
6	39.654	19.61731	.20703	57	14.143	10.35931	.56310
7	39.691	19.62502	.20673	58	13.603	10.04630	.57514
8	39.625	19.61097	.20727	59	13.072	9.73131	.58726
9	39.264	19.53413	.21022	60	12.549	9.41474	.59943
10	38.891	19.45359	.21332	61	12.029	9.09765	.61163
11	38.507	19.36943	.21656	62	11.532	8.78052	.62383
12	38.113	19.28184	.21993	63	11.039	8.46412	.63600
13	37.710	19.19065	.22344	64	10.557	8.14888	.64812
14	37.298	19.09590	.22708	65	10.088	7.83552	.66017
15	36.877	18.99764	.23086	66	9.630	7.52476	.67212
16	36.447	18.89569	.23478	67	9.185	7.21699	.68397
17	36.010	18.79010	.23884	68	8.753	6.91298	.69565
18	35.505	18.68070	.24305	69	8.333	6.61301	.70719
19	35.113	18.56751	.24740	70	7.926	6.31716	.71857
20	34.652	18.45038	.25191	71	7.532	6.02612	.72976
21	34.186	18.32932	.25656	72	7.151	5.74003	.74077
22	33.711	18.20416	.26138	73	6.782	5.45928	.75157
23	33.230	18.07471	.26636	74	6.425	5.18402	.76215
24	32.742	17.94097	.27150	75	6.081	4.91463	.77251
25	32.248	17.80274	.27682	76	5.749	4.65125	.78264
26	31.747	17.65984	.28231	77	5.428	4.39383	.79254
27	31.239	17.51224	.28799	78	5.119	4.14286	.80220
28	30.725	17.35968	.29386	79	4.823	3.89858	.81159
29	30.205	17.20225	.29991	80	4.537	3.66071	.82074
30	29.678	17.03961	.30617	81	4.262	3.42900	.82965
31	29.147	16.87176	.31262	82	3.995	3.20258	.83836
32	28.008	16.69846	.31929	83	3.737	2.98024	.84691
33	28.067	16.51964	.32617.	84	3.484	2.76106	.85534
34	27.516	16.33503	.33327	85	3.236	2.54366	.86371
35	26.961	16.14437	.34060	86	2.992	2.32795	.87200
36	26.401	15.94755	.34817	87	2.752	2.11384	.88024
37	25.834	15.74427	.35599	88	2.517	1.90115	.88842
38	25.263	15.53421	.36407	89	2.286	1.69107	.89650
39	24.685	15.31722	.37241	90	2.062	1.48540	.90441
40	24.101	15.09295	.38104	91	1.845	1.28432	.91214
41	23.511	14.86102	.38996	92	1.637	1.09024	.91961
42	22.915	14.62122	.39918	93	1.442	.90647	.92667
43	22.313	14.37356	.40871	94	1.263	.73687	.93320
44	21.708	14.11860	.41852	95	1.103	.58435	.93906
45	21.103	13.85713	.42857	96	.975	.46182	.94378
46	20.499	13.58958	.43886	97	.877	.36698	.94742
47	19.896	13.31698	.44935	98	.746	.24038	.95229
48	19.298	13.03942	.46002	99	.500	.00000	.96154
49	18.703	12.75716	.47088				
50	18.113	12.47032	.48191				

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TABLE B

1 Number of years	2 Present worth of an annuity of $1, payable at the end of each year, for a certain number of years	3 Present worth of $1, payable at the end of a certain number of years	1 Number of years	2 Present worth of an annuity of $1, payable at the end of each year, for a certain number of years	3 Present worth of $1, payable at the end of a certain number of years
1	$0.96154	$0.961538	16	$11.65229	$0.533908
2	1.88609	.924556	17	12.16567	.513373
3	2.77509	.888996	18	12.65929	.493628
4	3.62989	.854804	19	13.13394	.474642
5	4.45182	.821927	20	13.59032	.456387
6	5.24214	.790314	21	14.02916	.438834
7	6.00205	.759918	22	14.45111	.421955
8	6.73274	.730690	23	14.85684	.405726
9	7.43533	.702587	24	15.24696	.390121
10	8.11089	.675564	25	15.62208	.375117
11	8.76047	.649581	26	15.98277	.360689
12	9.38507	.624597	27	16.32958	.346816
13	9.98565	.600574	28	16.66306	.333477
14	10.56312	.577475	29	16.98371	.320651
15	11.11839	.555265	30	17.29203	.308319

To find the present worth of an annuity of a given amount for life, multiply the annuity by the figure in column 3, Table A, opposite the age at the nearest birthday of the person receiving the annuity.

To find the present worth of a remainder interest in property subject to the life tenancy of another, multiply the value of the property at the time of death by the figure in column 4 of Table A, opposite the number of years nearest to the age of the life tenant at death of testator. Where, however, the remainder interest is subject to an estate for a term of years, Table B should be used.

amount to be received in instalments over the term set. Just as easily is it possible to calculate the present worth of the remainderman's interest, i.e., the equivalent to the larger amount he will receive later. The calculations and annuity tables are based on various rates of interest. Since each state provides by statute the interest rate to be adopted (usually 4, 5, or 6 per cent), care must be taken to use the proper table.

As the expectation of life is an average, it may happen that the annuitant or tenant for life may die within the next year or live for many years in excess of the average. This may be to the advantage or detriment of the remainderman, but the state is not concerned in adjusting this.

If the annuity or interest is for a definite term of years rather than for the life of a person, that length of time is

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used as a basis for the calculations instead of the expectation of life.

§ 324. Case of an Annuity

If the will directs that an annuity is to be purchased outright, its value is a specific amount to be deducted as a legacy with its tax from the residuary estate.[6]

The present value of an annuity of a definite amount during life is computed, as has been said, on the basis of the expectancy of life. For example, an annuitant is to receive under the terms of his father's will an annuity of $1,000 during life. At the time of his father's death he is 40 years old. In New York the present worth of such an annuity would be found from the American Experience Table at 5 per cent. The expectation of life at 40 is 28.18. The present worth of $1 per annum for 28.18 years is $13.716. If the annuitant was to receive $1,000 per annum, the present worth would be $13,716. On this amount he would be taxed.

The present worth of an annuity of a definite amount during the lifetime of another person must be computed on the basis of the expectancy of life of that other person. This would be the case if a man left his property to his wife during her life, but directed her to give each of his daughters the sum of $1,200 per annum. If the annuity is for a definite number of years, the expectancy of life does not enter the matter, but the present worth of the annuity for that number of years is calculated.

> Where a testator left a life estate in about $100,000 of personal property, to his widow, subject, though, to an annuity of $200 to be paid his sister, aged 58, for her life and to the payment of $125 and house rent to his brother aged 66 for his life, it was held proper in calculating the present value of the widow's life estate for the purposes of the trans-

[6] Matter of Maresi, 74 App. Div. (N. Y.) 76.

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fer tax, "to deduct from the net value of the personal property, the present values of the annuities," such remainder to represent the amount on which the present value of the widow's life estate should be computed.[7]

§ 325. Hypothetical Annuities

In the case of estates in which the tenant is entitled to receive, instead of a definite amount, the entire income of a certain property during his own life, the life of another, or for a term of years, the rate of income being fixed by the instrument creating the trust or being definitely determinable at the time of the decedent's death, the average annual income which the property annually yields is determined and the present worth of that income computed as explained above in the case of annuities.

For example: The annuitant's father placed $100,000 in trust, with directions that it be invested in state and municipal bonds and the entire income paid to him during the life of his elder brother, who was 41 years old at the time of the decedent's death, at which time the money was already invested in state and municipal bonds, and was actually yielding a net return of $5,000 per annum. In this case the rate of income is definitely determinable.

If the rate of annual income is not determinable, or the tenant is entitled merely to the personal use of non-income-bearing property, a hypothetical annuity is made the basis of the calculation. For this purpose the laws of the different states use different percentages of the value of the property.

If an estate should be assessed before the fund from which a tenant is to receive the income during the life of another has been invested by the trustee, the value of a hypothetical annuity may be found by using the rate prescribed for such cases in the particular state.

[7] Matter of Hutchinson, 105 App. Div. (N. Y.) 487.

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§ 326. Value of Remainders

The present worth of a remainder interest subject to the life estate of another may be obtained by multiplying the value of the property by the figure in the column of the table used that gives the remainder value of $1 after the number of years representing the expectation of life of the life tenant. If the remainder interest is subject to an estate for a term of years, that should be used in finding the value of $1. In some cases, however, it may be necessary to modify the above procedure in order to follow the state law.

The law in force at the death of the testator governs the taxation of remainders and not the law in force at the time the remainders vest.[8]

Review Questions

1. Define "tenant for life," "tenant for years," "remainder," "remainderman." What is done for the tenant for life or for years in regard to real estate? What if the estate is in personal property? What is an annuity?
2. How are inheritance taxes apportioned on the different estates that have been named? Who pays them first? Who must pay ultimately? If circumstances change before the remainder takes effect so as to reduce the amount of tax, what is done by the state? How is an annuity valued? How is the tax repaid from the annuity?
3. How are the values of all the estates mentioned valued? What mortality table is used in your state?
4. How are mortality tables compiled? How is the present worth of an annuity found?
5. On what amount would the annuitant in the first paragraph of § 324 be taxed in your state? What would be the present worth of an annuity of $1,200 per annum for 15 years, in your state?
6. When the legatee is to receive the entire income of a property for life or a term of years and the rate can be ascertained, what

[8] State ex rel. Basting v. Probate Court. 132 Minn. 104.

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is the procedure? In the case given in § 325, what would be the amount on which the transfer tax would be calculated in your state? What is done in your state where the amount of income cannot be definitely ascertained?

7. How do you find the remainder value after a life estate in your state? Suppose the remainderman to be entitled to receive property worth $50,000 upon the death of an elder brother to whom the income for life was bequeathed, the brother being 41 years old. Work out the value of the remainder under your state law.

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CHAPTER XXXVII

FEDERAL ESTATE TAX

§ 327. Nature of the Law

The federal estate tax at present in force is based on Title IV of the Revenue Act of 1918. It differs from all previous transfer laws and from most of the state inheritance tax laws in that:

> The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs.[1]

As has been shown above, the features which especially distinguish the federal act from most of the state laws are that the tax is levied on the whole amount of the net estate without reference to the relation of the legatees or heirs to the decedent, and applies to both real and personal property. The tax is on the estate as a whole, and as a consequence, where there is a will the specific legacies are not affected and the whole amount of the tax comes out of the residuary legatees.[2] There is no tax on estates of a net value of less than $50,000, but above that figure the tax increases progressively with

[1] Article 1 of Regulations 37, Bureau of Internal Revenue. The validity of the last provision may well be questioned. In fact, many features of the law and the regulations under which it is enforced have not yet been passed upon by the supreme court. The regulations are, however, at this time almost the only authoritative interpretation of the law, and although they are binding until overruled they are not necessarily final. A copy of Regulations 37 should be secured from the nearest office of the Bureau of Internal Revenue. Its provisions go fully into all details relating to estate taxes.

[2] Matter of Hamlin, 226 N. Y. 407.

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the value of the estate, and an estate exceeding $10,000,000 would be taxed at the rate of 25 per cent on that part of the estate above this amount.

§ 328. Exempt Estates

The tax is imposed on the estate of "every decedent" who is a resident, where the net value of the estate exceeds $50,000. The estates of persons dying while actually serving in the military or naval forces of the United States in the late war with Germany are exempt from tax. The date of the termination of the war, for the purpose of this tax, is that fixed by proclamation of the president. An exception is also provided in the case of the estate of a person who, after leaving the service, dies from injuries received or disease contracted while in the service. Whenever exemption is claimed, the right to it must be proved by the executor.

§ 329. Estates of Non-Residents Taxed

The federal estate tax is applied differently to the estates of residents and non-residents.

> A person is a "resident" of the United States, for the purposes of this tax, only in case he had a *domicile* therein at the time of his death. A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom.[3]
>
> The estate of a non-resident decedent, however, is taxable *if any part of it* is situated in the United States. The statute takes no account of the citizenship of the decedent, but prescribes different rules according to whether the decedent was a "resident" or a "nonresident" of the United States. . . . A "resident" is one who at the time of his death resided in the States, the Territories of Alaska or Hawaii, or the District of Columbia. All other persons are "nonresidents."[4]

[3] Article 5 of Regulations 37.
[4] Article 4 of Regulations 37.

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The proposed revenue act before Congress as this book goes to press provides in regard to non-residents that money received from life insurance and money on deposit in this country, where the non-resident was not engaged in business therein, shall not be regarded as a part of his estate; further, a person commissioned as a foreign missionary and dying while in service shall not for that reason be deemed a non-resident.

The estates of non-residents are not allowed any part of the deduction of $50,000 allowed in the case of residents.

§ 330. Transfers That Are Taxable

The tax is imposed on:

1. Transfers by will or by virtue of intestate laws, including dower, curtesy, and like interests not taxable under state laws. (See § 249.)
2. Transfers made or trusts created *inter vivos* but in contemplation of death or intended to take effect at or after death. (See § 333.)
3. Joint estates broken up by reason of the death of a joint tenant or tenant of the entirety. (See § 336.)
4. Property passed under a general power of appointment.
5. Insurance taken out by the decedent, becoming payable to his estate in any amount or to one or more named beneficiaries in an amount in excess of $40,000. (See § 334.)

§ 331. Life Tenancies and Remainders

Life estates, estates for years, annuities, and remainder interests created by the decedent are not taxable as such under the federal transfer tax, the tax being levied only on the principal of the trust as a part of the estate as a whole. But if the decedent was entitled to a remainder upon the expiration of a tenancy not yet ended, and his estate will ultimately benefit

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thereby, or if he was the recipient of income from a tenancy or annuity which did not lapse at his death, so that there is a value which passes to his heirs, such an asset is to be included in the amount of the taxable estate.

> The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of a life estate in the decedent. There should be included, however, the value of an annuity payable to the decedent upon the life of a third person who survives him, and the value of an estate for the life of a person other than the decedent.[5]

The manner of using mortality and annuity tables is described in §§ 322 and 323. The United States Bureau of Internal Revenue has for its own use, however, a set of tables[6] which apply to all cases which come under its jurisdiction. These tables are at 4 per cent, whereas many of the states use 5 and 6 per cent for their purposes.

Typical examples of cases which come under the federal law are suggested below, with the methods of determining values:

If the decedent was the recipient of an annuity for the life of another person, the annuity not lapsing on his own death, the taxable value is the present worth of the annuity based on the expectancy of life of the other person at the time of the decedent's death.

If a decedent was to receive an annuity for a period of years, part of which had expired at the time of his death, the taxable value would be the value for the unexpired portion of the period.

If a decedent was entitled to receive the entire income of a

[5] Article 12 of Regulations 37.
[6] Published in Regulations 37. See page 324 of this book.

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certain property during the life of another or for a term of years, such income not lapsing upon his death, the present worth at that time should be computed as explained above in the case of annuities upon the valuation determined from the tables.

If the rate of annual income is not determinable, or the decedent was entitled merely to the personal use of non-income-bearing property, and a hypothetical annuity has to be made the basis of the calculation, the federal government uses 4 per cent of the value of the property.

If a remainder interest was held by a decedent subject to the life estate of another or an estate for a term of years, such interest constituting an asset of his estate, its present worth at the time of his death may be obtained by deducting the value of the life estate or of the unexpired term as shown by this table.

§ 332. Gross Estate

The gross estate includes everything that is included in the corpus of the estate,[7] and much more, as in it there must be listed the various items shown above, some of which never come into the hands of the executor or the administrator—a few of them, things over which a probate court would have no jurisdiction.

While the gross estate includes some items the title to which did not rest in the decedent at the time of his death, it does not necessarily include everything the title to which was in his name.

> There must be an actual, beneficial ownership in the decedent, not a bare legal title, or one held in trust. Thus, property actually devoted to religious or charitable purposes, and placed in the name of an individual solely for convenience in administration, is not included in his gross estate.

[7] See Chapter XXXV, "Corpus and Income."

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> The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate. It consequently does not include a right which came into existence only after the decedent's death, such as a cause of action by statute for causing the death.[8]

From the amount of the gross estate all debts and claims must be paid, and certain deductions and specific exemptions [9] may be taken in determining the amount of the taxable estate.

§ 333. Transfers by Decedent in His Lifetime

The value of the gross estate must include the value of any interest of the decedent's:

> To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death.[10]

The regulations define and explain the various stipulations of this section, but until the courts have passed on it the public will not be sure of its scope. Until that time every case to which it might apply must be considered separately, and the separate provisions of the law (and possibly of the Constitution itself) weighed against the facts in the particular case.

§ 334. Taxable Insurance

The new federal inheritance law taxes all life insurance in excess of $40,000 whether in favor of dependents or of the

[8] Article 12 of Regulations 37.
[9] See Chapter XXXVIII, "Deductions Under the Federal Law."
[10] Revenue Act of 1918, § 402.

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estate. As insurance is the result of a contract and as the beneficiary does not take either by will or inheritance, this provision may be held unconstitutional. For federal tax purposes "insurance" is defined as follows:

> The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds belonging to, or advanced by the decedent.[11]

§ 335. Location of Property as Affecting Inclusion

> Real property owned by the decedent, when situated in the United States, should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Real property not situated in the United States should not be included, whether the decedent was a resident or nonresident. Where the decedent was a resident, all personal property owned by him should be included, wherever situated. Where decedent was a nonresident so much of his personal property as was actually situated in the United States at the time of his death should be included.[12]

§ 336. Property Held Jointly or as Tenants in the Entirety

All interests, whether in real or personal property, in which the survivor takes the entire property solely by the right of survivorship, and which consequently do not form part of the decedent's estate for purposes of administration, are to be included in the gross estate for federal taxation at the value of

[11] Article 32 of Regulations 37.
[12] Article 13 of Regulations 13.

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the whole. This does not refer to interests held as tenants in common, where the interests of each tenant pass to his own estate free from the right of survivorship. In each case only the value of the decedent's separate interest would be included in the gross estate.

The value of such property required to be returned for tax is the value of the entire property, unless it can be shown that part of it originally belonged to the other joint owner and never belonged to the decedent.

> An exception is made, however, where property is conveyed to husband and wife without valuable consideration, or where the property was purchased out of common funds, representing the savings of husband and wife, or was the fruit of joint labor, the proportion of the several contributions having been lost sight of. In such cases one-half of the total value of the property should be returned.[13]

§ 337. Payment of Tax

The tax is due and payable one year from the date of death. Payment will not be accepted before a return in proper form has been filed. Extensions of time for tax payment are granted only in exceptional cases, where it is evident that the payment of the tax within the statutory period would cause the estate serious financial loss. If the tax is not paid within one year and 180 days after the decedent's death, interest at 6 per cent per annum from the expiration of one year after the decedent's death will be added as part of the tax whether or not an extension has been granted.[14]

§ 338. Responsibility for Payment

The responsibility for payment of the tax upon the transfer of the entire estate, including property which will not come into his possession, rests upon the executor or the administrator.

[13] Article 29 of Regulations 37.
[14] Revenue Act of 1918, § 406; and Article 94 of Regulations 37.

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> The executor is personally liable for the payment of the estate tax to the amount of the full value of the assets of the estate which have at any time come into his hands.[15]

Where no executor or administrator has been appointed, every person in possession of any part of the gross estate is liable for the tax as an executor.

In the case of non-residents, if no executor or administrator has been appointed in the United States:

> Every person in the United States in possession of any part of the decedent's gross estate is constituted an executor for the purpose of tax payment, and is liable for the tax upon the transfer of the portion of the gross estate in his possession.[16]

All persons on whom rests the responsibility for payment of the tax are personally liable therefor.

The Revenue Bill of 1921, as before Congress at the time this book goes to press, provides that if an executor files a complete return and makes application for the determination of the tax, the Commissioner shall within one year notify him of the amount of the tax, and that payment thereof shall discharge the executor from personal liability.

Review Questions

1. What are the peculiar features of the federal estate tax?
2. What estates are exempt from the federal tax?
3. What is the test of residence for the federal tax? Who are non-residents?
4. What transfers are taxable under the federal act? What amount of insurance is free from tax?
5. What is the gross estate? What things are included that would not be taxed under the state laws? Are estates held by decedent as trustee included?

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[15] Revenue Act of 1918, § 407; and Article 113 of Regulations 37.
[16] Article 65 of Regulations 37.

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6. Should a gift of property made by decedent in his lifetime be subject to the federal tax? To what transfer does the two-year rule apply?
7. What is the rule as to life insurance? What life insurance is excepted?
8. What is the rule as to the inclusion of real estate? What is the rule as to real estate out of this country? What is the rule as to personal property of a resident? Of a non-resident?
9. What is the rule as to a joint estate? As to an estate in common? As to the estate of a tenant in the entirety? What is the exception in case of tenancy in the entirety?
10. When is the tax due? When are extensions granted? When does a penalty attach?
11. Who is responsible for payment? In case of non-residents, who is responsible? In case no executor has been appointed, who is responsible?

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CHAPTER XXXVIII

DEDUCTIONS UNDER THE FEDERAL LAW

§ 339. The Net Estate

It is only the net value of the estate which can be taxed, therefore from the amount of the gross estate determined as described in the preceding chapter, the following deductions may be taken in obtaining the net taxable estate of a resident decedent for purposes of the federal tax:

1. Funeral expenses.
2. Administration expenses.
3. Claims against the estate, including mortgages.
4. Losses from casualty or theft.
5. Support of decedent's dependents.
6. Specific exemption of $50,000.
7. Certain public, religious, charitable, scientific, literary, and educational bequests.
8. Property upon which an estate tax has been paid to the federal government within five years.

An item to be deductible must be both: (1) deductible under the classification furnished in the law, and (2) payable out of the corpus [1] under the state law.

If an item fails to conform to either one of those requirements, it is not a proper deduction to be made for the computation of the federal transfer tax. If the amount which may be expended for the particular purpose is limited by the state law, no deduction in excess of such limitation is permissible.

[1] See Chapter XXXV, "Corpus and Income."

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> The decision of a local court as to the amount of a claim or administration expense will ordinarily be accepted where the court passes upon the fact upon which deductibility depends.[8]

But it must appear that the court actually passed upon the merits of the case. As an example of claims allowed by a state court but which are nevertheless not deductible for estate tax purposes because the court did not pass upon the fact upon which deductibility depends, the federal regulations suggest a legacy left to an executor in lieu of commissions. In such case the court would allow the legacy as compensation for the executor, but it might not all be justly such an expense of administratorship as could properly be deducted. Only the actual expense would be allowed by the law as a deduction from the gross estate of the decedent for either federal or state tax purposes.

> The allowance of the legacy does not establish that the executor's claim for commission is equal to the amount bequeathed, and that this amount is consequently deductible.[8]

Certain items that are deductible from the amount of the gross estate under the federal law are also deductible under the state laws. These are commented on in the following sections.

§ 340. Funeral and Administration Expenses

> An executor may deduct such amounts for funeral expenses as are actually expended by him, provided expenditures of this nature are a liability of the estate under the laws of the local jurisdiction. A reasonable expenditure by the executor for a tombstone, monument or mausoleum, or for a burial lot, either for the decedent or his family, may be deducted, provided such an expenditure is made a charge upon the estate by the local law. Included in funeral ex-

[8] Article 39 of Regulations 37.
[8] *Ibid.*

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penses is the transportation of the person bringing the body to the place of burial.[4]

Reasonable funeral expenses are deductible in all of the states. (See § 266.) All the ordinary expenses of administratorship are deductible if reasonable. These include, besides the executor's commission, the expense of collection of assets, payment of debts, distribution of the estate, attorney's fees, court costs, surrogate's fees, accountant's fees, appraiser's fees, clerk hire, cost of storing, maintaining, and preserving the property, etc.

Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions.[5]

None of the allowable items may be deducted after the time has elapsed for which the executor is required to retain the property.

The proper executor's commission may be deducted, subject to the following limitations:

No amount may be deducted as commission in excess of that actually paid, or to be paid. Where the commission has not been allowed by the probate court, it may be deducted if its amount and future allowance are reasonably certain. In such case the executor must furnish satisfactory evidence at the time investigation is made that an account will be filed and the commission claimed. Where the executor does not intend to make any charge upon the estate for his services, or where he does not intend to file any account with the local court, no deduction may be claimed.[6]

No deduction may be made for trustees' commissions, and an executor who acts as trustee is not entitled to deduct the commission he receives for his services in the latter capacity.[7]

[4] Article 40 of Regulations 37.
[5] Article 41 of Regulations 37.
[6] Gleason and Otis, Inheritance Taxation, pp. 615, 616.
[7] Article 42 of Regulations 37.

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§ 341. Claims Against the Estate

The amounts that may be deducted under this heading are such only as represent personal obligations of the decedent existing at the time of his death, whether then matured or not. Obligations contracted by the executor are not deductible under this head. Only such claims as are actually enforcible against the estate may be deducted.

In the list of claims there should be included all accrued liabilities, such as interest, taxes on real property, etc. In reference to taxes on personal property, the regulations are as follows:

> Taxes upon personal property are either wholly deductible, or are not deductible at all, depending on whether the tax did, or did not, become the personal obligation of the taxpayer in his lifetime.[8]

The obligation for personal property taxes arises at the date of the assessment of the tax; consequently such taxes are debts of the testator if they were assessed as of a date before his death. Taxes upon both personal and real property are in theory debts due by the owners of the property to the government, although in practice the remedy to collect them may sometimes be confined to a sale of the property taxed without recourse to a personal action against the owner of the property.

The amount of all general taxes due and unpaid may be deducted.

> In the case of federal taxes upon income, the tax upon income received or accrued during the decedent's lifetime constitutes the personal obligation of the decedent, and is deductible. Taxes upon income received after the decedent's death are not deductible. No estate, succession, legacy, or inheritance tax is deductible.[9]

[8] Article 46 of Regulations 37.
[9] *Ibid.*

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In computing the state transfer taxes, the federal tax may be deducted in Connecticut, Minnesota, New Jersey, and Illinois. The question has not come up as yet in many of the states.

§ 342. Unpaid Mortgages

The amounts of mortgages are deductible. Under the federal regulations:

> The full amount of unpaid mortgages on property included in the gross estate should be deducted . . . including interest which had accrued at the time of death, whether payable at that time or not. Interest should be computed upon the basis of 365 days to the year. The full value of the real estate, without any deduction for mortgages, must be returned as part of the gross estate. As real property situated outside of the United States is not part of the gross estate, the amount of mortgages upon such property should be deducted only where the decedent was personally liable for the mortgage debt.[10]

§ 343. Losses from Casualty or Theft

The federal regulations allow the deduction of losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or from theft or other losses of a fortuitous and unusual character, such as result from violence or from a disaster which could not be foreseen or prevented by the exercise of reasonable care, when such losses are not compensated by insurance or otherwise. If the loss is partly compensated, the excess of the loss over such compensation may be deducted. Losses due to the death of animals from disease are deductible. In order to be deductible a loss must occur during the settlement of the estate, but losses sustained by reason of depreciation in the value of the assets of the estate subsequent to the decedent's death are not of the nature described and are not deductible.

[10] Article 47 of Regulations 37.

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§ 344. Support of Decedent's Dependents

The only form of support of the decedent's dependents permitted as a deduction by the federal regulations is money. Furniture and other personal property turned over cannot be deducted. The alleged dependent must have actually required for his support the amount claimed, but if the dependent has lands or other assets which do not yield an income and which he would have to sell or mortgage were it not for the amount paid over from the estate, the amount may be taken as a deduction.

§ 345. Public and Semipublic Bequests

For federal tax purposes there may be deducted:

> . . . the amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes.[11]

In order to be exempt, the corporation, trust:

> . . . or association must meet three tests: (1) it must be organized and operated for one or more of the specified purposes; (2) it must be organized and operated *exclusively* for such purposes; and (3) no part of its income must inure to the benefit of private stockholders or individuals.[12]

The regulations suggest as exempt:

> . . . an association for the relief of the families of clergymen, even though the latter make a contribution to the fund

[11] Revenue Act of 1918, § 403.
[12] Article 54 of Regulations 37.

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established for this purpose; or for furnishing the services of trained nurses to persons unable to pay for them; or for aiding the general body of litigants by improving the efficient administration of justice. . . . An association whose sole purpose is the instruction of the public, even if it merely disseminates propaganda on a single question. Thus an association inculcating prohibition or protectionist principles is exempt. . . . Societies designed to encourage the performance of first-class orchestral music are not exempt, the purpose being merely to provide a high grade of entertainment.[18]

§ 346. Property Previously Taxed

The federal regulations also allow a deduction of an amount equal to the value at the time of the present decedent's death, of any property which can be identified as having been received by him as a share from the estate of any person who died within five years prior to the present decedent's death, if an estate tax under the Revenue Act of 1917 or the Revenue Act of 1918 was actually collected from such estate, and also an amount equal to the value of the property which can be identified as having been acquired by the decedent in exchange for property received as a share in the estate of such a prior decedent. The property received from the prior estate must have been returned as part of the gross estate of the prior decedent, and the property the value of which is sought to be deducted, or property taken in exchange therefor, must have been included in the gross estate of the second decedent.

Under the proposed revenue act before Congress as this work goes to press, the value subject to tax at the time of the prior transfer is the measure of the deduction allowed.

§ 347. Specific Exemptions

The first $50,000 of the estate of every resident decedent is exempt. Consequently, estates of residents appraised at

[18] Article 54 of Regulations 37.

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less than that amount are entirely exempt. Any part of the estate of a non-resident decedent, however, situated in the United States, is taxable without regard to the amount.

For exemptions for those dying while actually serving in the army or navy or from injuries received or diseases contracted while in the service, see § 328.

§ 348. Deductions Allowed Non-Resident Decedents

The rules in the various states differ, but as the federal law is applicable in all it can be more fully commented on here.

> Whereas the net estate in the case of a resident is determined by making the specified deductions from the entire gross estate, the net estate in the case of a non-resident is determined by making the deductions from the value of so much of the gross estate as is situated in the United States.[14]

There may be deducted only that portion of funeral and administration expenses, claims against the estate, losses from casualty or theft, and an allowance for the support of the decedent's dependents, which the part of the estate in the United States bears to the whole estate, and in no case may the amount so deducted exceed one-tenth of the value of the gross estate in the United States. It is immaterial whether the expenses and claims are paid and incurred in this country or elsewhere.

The specific exemption of $50,000 allowed to residents (see § 347) does not apply to estates of non-residents, nor is there any exempt amount allowable in its place.

Property the transfer of which was previously taxed is exempt if in the United States at the time of the death of the second decedent.

Bequests of a public or semipublic nature made by a non-resident are exempt if they conform to the requirements for

[14] Article 59 of Regulations 37.

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such legacies from the estates of residents, with the following limitations:

> Where the bequest is to a corporation, it is limited to a domestic corporation; that is, one created or organized in the United States. Where the bequest is to a trustee, it must be for use exclusively within the United States. The requirements are different and should not be confused. The first relates to the character of the donee; the second to the character of the use of the gift.[18]

Review Questions

1. How is the amount of the net estate determined? What deductions are made? What weight has the decision of a state court as to the amount of deductions?
2. What is the rule as to funeral expenses? Do the state and the federal practices on this subject coincide?
3. Generally, what is allowed under the head of administration expenses? Do the state and the federal practices coincide? When an executor acts as trustee, may his fees as trustee be deducted?
4. What claims may be deducted? When are taxes deductible? Are personal taxes to be deducted? Taxes on realty? Taxes on income? State inheritance taxes?
5. What is the rule as to claims secured by mortgage? What is the rule as to interest?
6. What is the rule as to deducting the executor's commission? May such commission be deducted before it is paid? If a legacy were left to the executor in lieu of his commission, can it be deducted?
7. What is the rule concerning casualties and theft? When must such loss occur to be deductible?
8. What deduction for dependents is allowed by the federal law?
9. What is the rule as to bequests for public or charitable purposes? What are charitable purposes in this sense?
10. What is meant by "property previously taxed"?

[18] Article 63 of Regulations 37.

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11. What is the specific exemption for residents? Does this apply to non-residents?
12. How is the net estate of a non-resident determined?
13. What limit is placed on the amount of deductions from the estate of a non-resident?

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CHAPTER XXXIX

PROCEDURE UNDER FEDERAL LAW

§ 349. Filing Papers for Federal Tax

The following general rules apply to all papers required to be filed in connection with federal estate tax matters:

In the case of resident decedents the filing must be done at the office of the collector in whose district the decedent had his domicile at the time of his death; in the case of non-resident decedents, with the Commissioner of Internal Revenue, Washington, D. C.

No papers are required to be filed in the case of a resident's estate of less than $50,000.

All papers must be filed in duplicate.

The executor or the administrator is responsible for the filing of all papers, but under certain circumstances others must file. (See next section.)

§ 350. The 60-Day Notice

The first document required to be filed for the federal tax is known as the "60-day notice."

The executor or the administrator of an estate is required to file notice on Form 704 secured from an office of the Bureau of Internal Revenue for that purpose,

> . . . within 60 days of his appointment by the court, or of coming into possession of any property of the estate, whichever event occurs first. The primary purpose of the notice is to advise the Government of the existence of taxable estates, and filing should not be delayed beyond the 60-day period because of uncertainty as to the exact value of the assets. . . .

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Where there is doubt as to whether the gross estate exceeds $50,000, the notice should be filed, as a matter of precaution, in order to avoid penalties. . . .

In the case of the estates of nonresident decedents, notice is required if there is any property situated in the United States, without reference to its value.[1]

The 60-day notice must be filed by others if:

(1) No executor or administrator has been appointed.

(2) There is property included in the gross estate, as defined by statute, which has not, and will not, come into the custody and control of the executor.[2]

The regulations hold that:

Where no executor or administrator has been appointed, the person taking possession of property at the time of death is required to file notice within 60 days of the date of death. The notice must be filed whether possession of the property was held at the date of death, or was acquired thereafter.[3]

On the other hand:

Where there is property that will not come into the custody and control of the executor, but which is included in the gross estate as defined by the statute, the notice on Form 704 must be filed within 60 days of the date of death by the person in possession or control of the property at the time of death.[4]

The executors of estates for which military exemption is claimed are required to file the notice, but should write across the face of the form the words "Military Exemption Claimed."

§ 351. Filing the Federal Return

In all cases where the amount of the gross estate of a resident exceeds $50,000, there must be filed within one year after the date of demise a return setting forth:

[1] Articles 66 and 67 of Regulations 37.
[2] Article 68 of Regulations 37.
[3] Article 69 of Regulations 37.
[4] Article 70 of Regulations 37.

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1. The amount of the gross estate
2. The amount of the allowable deductions
3. The value of the net estate
4. The amount of tax payable thereon

Returns for non-resident estates must be filed if there is any property whatever within the United States.

> If there is more than one executor or administrator, the return must be made jointly by all. . . . The executor or administrator is required to make a return of the entire gross estate of the decedent, including property which will not come into his possession, such as property transferred by the decedent before death, and property owned by tenants in the entirety. If the executor is unable to make a complete return as to any part of the gross estate, he is required to give all the information he has as to such property, including a full description, and the name of every person holding a legal or beneficial interest in the property. Where the executor is unable to make a return as to any property, the statute requires every person holding a legal or beneficial interest therein, upon notice from the collector, to make return as to such part of the gross estate.[8]

In the case of estates of non-residents:

> It is the duty of any executor or administrator appointed in the United States to file a return for the whole of that part of the gross estate situated in the United States, whatever its value. If there is no such executor or administrator, every person in possession of any part of the gross estate in the United States may be required to file a return for such part. Notice will be given to such persons, however, where a return is required.[9]

§ 352. Nature of Return

The return is made on the Form 706 furnished by the Collector of Internal Revenue for the district and must contain

[8] Article 80 of Regulations 37.
[9] Article 88 of Regulations 37.

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all the information necessary for the computation of the tax and audit of the return, together with such supporting schedules as are called for in the printed form of return. Certified copies of the will must accompany it, and in the case of non-residents there must be filed a complete inventory of the estate, wherever located, and a statement of claims filed under foreign taxing acts. The executor or other persons may be called on to furnish any other information which will assist in the determination or verification of the total amount of tax to be levied.

§ 353. Extension of Time for Filing Return

If it is impossible for the executor to file a complete return within the proper time, he may, upon satisfying the collector of that impossibility, secure extensions of time of not to exceed 60 days each and in no case of a greater aggregate than 180 days. If the return which he finally files at the end of his extension is not correct or is incomplete, or if the return is filed within the proper time and afterward is found to be wrong, an amended return should be filed, when the error can be corrected.

§ 354. Computation of Tax

While it seems that the states desire to encourage a person's leaving his property to his immediate relatives, since the tax upon transfers to immediate relatives is nominal if levied at all, the theory of the federal tax is that it is one for revenue only. To compute it the net estate is divisible into blocks, each block being taxed at a different and increasing rate in much the same way in which the surtax is computed on individual incomes.

The Bureau of Internal Revenue furnishes the following example of the use of the table for the computation of the federal tax:

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The net estate of a decedent dying on or after February 25, 1919, amounts to $1,240,000. By reference to the table it will be seen that the last complete block prior to this amount is $1,000,000, and that the total tax on a million dollars under the rates in force amounts to $51,500. Upon the remainder of the estate, $240,000, the tax is computed at the rate contained in the following line, or at 10 per cent. The tax on this amount is consequently $24,000. The following result is thus obtained:

Total tax on.....	$1,000,000	$51,500
Tax on	240,000	24,000
Total	$1,240,000	$75,500[1]

TABLE FOR COMPUTATION OF FEDERAL ESTATE TAX

Net Estate			Rate (per cent)	Tax	Total
Exceeding	Not Exceeding	Amount of Block			
.....	$ 50,000	$ 50,000	1	$ 500	$ 500
$ 50,000	150,000	100,000	2	2,000	2,500
150,000	250,000	100,000	3	3,000	5,500
250,000	450,000	200,000	4	8,000	13,500
450,000	750,000	300,000	6	18,000	31,500
750,000	1,000,000	250,000	8	20,000	51,500
1,000,000	1,500,000	500,000	10	50,000	101,500
1,500,000	2,000,000	500,000	12	60,000	161,500
2,000,000	3,000,000	1,000,000	14	140,000	301,500
3,000,000	4,000,000	1,000,000	16	160,000	461,500
4,000,000	5,000,000	1,000,000	18	180,000	641,500
5,000,000	6,000,000	1,000,000	20	200,000	841,500
8,000,000	9,000,000	1,000,000	22	220,000	1,461,500
10,000,000	.....	.....	25	.....	.....

§ 355. Penalties

Heavy penalties are provided for failing to file the 60-day notice or the return, for making a false or fraudulent return, and for failing to exhibit, at the request of the Commissioner or of any collector, any property forming part of the gross estate or any record, file, or paper, supposed by the department to contain information relating to the estate.

[1] Article 8 of Regulations 37.

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Review Questions

1. Where are the papers relating to the federal estate tax filed when the decedent is a resident? When he is a non-resident? Who is responsible for filing? When are no papers to be filed?
2. What is the 60-day notice? Where must it be filed? When no executor has been appointed, who must file this notice? What is the rule when military exemption is claimed?
3. When must the federal return for residents be filed? What must this set forth? What is the rule as to return? If there is no personal representative, who makes the return?
4. What must be filed with the return?
5. When may an extension of time to file the return be obtained?
6. How is the filing of accurate returns enforced?
7. How is the amount of the tax computed? What would be the tax on an estate of $60,000? Of $200,000? Of $900,000?

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PART IV
THE LAW OF TRUSTS

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CHAPTER XL

THE NATURE OF TRUSTS

§ 356. Trusts—Definitions

A trust is a legal arrangement by which a person known as the "trustee" holds property for the benefit and advantage of another, known as the "beneficiary" or, in legal phrase, as the *cestui que trust.*

The parties to a trust are: (1) the creator, (2) the trustee, and (3) the beneficiary or *cestui que trust.*

The property or subject matter may be real estate or money, goods, chattels, or choses in action. Anything that can be held legally may be the subject of a trust.

Wherever the legal estate or interest is in one person and the equitable interest is in another, a trust exists. It is called a "trust" because it is founded on trust and confidence in the trustee, that he will carry out the wishes of the creator of the trust as expressed in the will or the deed of trust.

A trust is not a contract and therefore no suit can be brought in a court of law for what is called a "breach of trust," but in a court of equity a trust can be enforced, and hence all litigation concerning trusts is conducted in the courts of equity or chancery.

A beneficiary or *cestui que trust* holds what is termed in law an "equitable title." To explain this requires that some definition be given of the legal and technical distinction between common law and equitable titles.

The vital distinction between trust estates and all other ordinary estates is that in every trust there are two interests. Both these interests are spoken of as estates. That of the

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trustee is known as the legal estate and that of the beneficiary as the equitable estate. As the legal owner of the property the trustee may be personally liable for any nuisance created by the property or conducted on the property. At the same time the trustee is not allowed to derive any benefit from the property or from the trust.

On the other hand, it is not intended that the trusteeship should become a personal burden to the trustee. All the expense which the trusteeship involves, such as repairs, insurance, taxes, legal expense, etc., may be paid for out of the trust funds.

§ 357. Common Law Titles

The common law of England, from which most of our own law has been derived, was simple and direct. It did not recognize anything but direct ownership by the man in possession of property. If property were left by will to Arthur Howe, "in trust," to collect the rents and income and to pay them over to the testator's widow, the common law courts would not enforce the trust, and if Arthur Howe failed to pay over the profits to the widow the courts of common law could give no relief. So far as the common law was concerned, such a thing as property held "in trust" did not exist. It recognized that Arthur Howe had the legal title, and that was the only title the common law courts would enforce.

Because the common law would not assist the beneficiary of a trust, and because in many other ways it had no flexibility or adaptability to an advancing civilization, those who could not right their wrongs in the common law courts petitioned the king as the fountain of justice to give them relief. The king referred these various complaints as they arose to his chancellor. The king's chancellor was a church dignitary and was well pleased to administer the principles of the Roman or civil law in which all dignitaries of the church were trained.

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§ 358. Courts of Equity

Gradually, many causes which the courts of common law would not hear were in this way brought to the attention of the chancellor and there gradually developed a widely extended system of jurisdiction, called, to distinguish it from the common law, "equity jurisdiction," and the courts in which it was administered were called from the chancellor, "courts of chancery or equity." Having two systems of legal relief in the same country was confusing and uneconomical but it came about in the course of time, and for more than two hundred years the courts in England were divided into two distinct systems, one termed "law" and the other termed "equity." The terms so used add to the layman's confusion because the decisions of the courts of chancery are as much the law of the land as the decisions of the courts of common law, and neither court has any monopoly of the quality of equity.

When a lawyer says that a case is an equitable case, he means that it will have to be tried in a court of equity, and when he talks of a law case he means that suit must be brought in a court of common law and not in a court of chancery.

Equity procedure was at first simple and informal, but human nature loves forms and settled customs, and chancery procedure soon became more formal and complex than even the common law, and a chancery suit became proverbially slow.[1]

Equity was brought to this country and, as in England, was used as a separate system to supplement the defects of the common law.

In some states the attempt has been made to combine law and equity and to have both legal and equitable cases tried before the same courts, but even where this is the case the legal profession has kept up the distinction between the two.

[1] The reader who wishes to go further into this subject may read Story, Equity Jurisdiction, Vol. I, § 56, and notes.

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In fact, it is not possible to understand our system of administering justice without a recognition of this difference between what is technically and arbitrarily called "law" and "equity."

§ 359. Equitable Titles

As has been said, the courts of common law refused to give any relief to the person who was to benefit by property placed in trust, if the trustee refused to do his duty. The courts of chancery did give relief, and all litigation concerning trusts and their administration is to this day a most important function of chancery jurisdiction. It is vitally necessary to any study of the law of trusts that at least as much as has here been given in regard to the distinction between "law" and "equity" and the difference between "legal titles" and "equitable titles" should be understood.[2]

§ 360. The Legal Title in the Trustee

An essential element in a trust is that the trustee has the legal title. If it is real estate, every feature of ownership, title on public records, actual possession, liability for taxes, right to sue for trespass, etc., is in the trustee. No one else has power to sell, mortgage, or lease. Every element of legal possession is in the trustee. In event of the death of a sole trustee, his heirs would take the property if it was land, and his executors or administrators if it was personal property. Those who thus take the legal estate would take it charged with the trust. Heirs and executors cannot be compelled to act as trustees against their will, and if they decline, the court having jurisdiction will appoint new trustees to succeed the original trustees. If there are several trustees, the title will pass to the survivors until no one is left.

[2] See earlier chapters. See also Woodruff, Introduction to the Study of Law, pp. 46-52.

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§ 361. The Equitable Title in the Beneficiary

As the legal title is in the trustee so is the beneficial interest entirely in the one for whose benefit the trust was created. Unless the instrument by which the trust is created provides otherwise, the beneficiary, if of age, can sell or dispose of his or her equitable estate in the property as freely as can the owner of a legal title. When it is desired to prevent anything of this kind, the deed or will may provide against it. Being an equitable title, any dispute concerning its terms or interference with the rights of the beneficiary will have to be settled in a court of equity instead of in a court of law.

§ 362. Creating a Trust

The purposes for which trusts are created are at this time diverse, and will be considered in detail later. Suffice it for the present to state that perhaps the most common and simplest illustration of the creation of a trust is afforded by the case of a man with wife and children, who makes his will and arranges it so that if he dies his property will be safe and the income be applied to the maintenance of those dependent on him. In such case it would be natural that he should select some capable business man or men, younger than himself, and leave the property to them, in trust, to handle it and care for it, and to pay over the income to his wife for herself and the children. This kind of transfer could be done by will or by deed or conveyance of some kind.

The effect would be to make his friend or friends trustees, and his wife and children would be beneficiaries. The legal estate would go to the trustees, and if it were necessary to prosecute trespassers or there were a suit about the title to any part of the estate, such a suit would be brought in a common law court. But if his friends died or became incompetent, his wife and children, having only an equitable interest, would go to a court of equity for relief. A court of equity would have

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power to do whatever was necessary to be done. It could require the trustees to account, and show what they had done in managing the property, what income or profits had been collected, and what part had been paid over. If there had been carelessness or fault, the court could compel restitution. If the trustees were incompetent or dishonest, the court could remove them and appoint more reliable men. In short, a court of equity has power to do whatever should be done to make the trust effectual.

Whenever, by will or deed, the legal interest in real or personal property is placed in one person while the equitable or beneficial interest is in another, a trust has been created.[3]

> It may be stated as a general proposition, that everyone competent to enter into a contract, or to make a will, or to deal with the legal title to property, may make such disposition of it as he pleases; and he may annex such conditions and limitations to the enjoyment of it as he sees fit; and he may vest it in trustees for the purpose of carrying out his intention. All persons, *sui juris*, have the same power to create trusts that they have to make a disposition of their property.[4]

§ 363. The Instrument That Creates a Trust

A trust may be created by will, by deed of trust, by declaration of trust, or if it concerned only personal property, theoretically a trust could be created orally. Practically, no trusts are created orally, but they always come into being by some written instrument.

According as trusts are created by will or by some other written instrument, they are classified as "testamentary trusts" or as "voluntary trusts." In neither case is there any prescribed form of words that is necessary to create a trust. It is usual and always advisable to use the words "in trust" to

[3] Pollack and Maitland, History of the English Law, Vol. II, pp. 226, 227.
[4] Perry on Trusts, § 28.

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introduce the purposes of the trust and the disposition of the property and income placed in the custody of the trustee.

A "testamentary trust" is so called because it is created by a last will and testament.

A "voluntary trust" is so called because it is in practically all cases created by a voluntary deed or instrument of transfer executed not under compulsion or to fulfil a contract obligation, but freely to secure some kindly or benevolent purpose.

For examples of the creation of testamentary trusts and voluntary trusts, see Form 7.

§ 364. Express Trusts

Nearly all trusts are express or direct trusts—that is, they are created by wills or other instruments that directly and explicitly describe the property that is to be the subject of the trust, the person or persons who are to be trustees, and the persons who are to be the beneficiaries, and set forth what the trustees are to do with the property and the disposition that is to be made of the income and, finally, of the fund or property itself. If the language of the will or other instrument is not clear and explicit, a trust might be implied or presumed which, to distinguish it from an express trust, would be called an "implied trust."

An express trust in land must of necessity be in writing to conform to the provisions of the Statute of Frauds. In most states in this country it is possible to create an express trust in personal property by parol.[5] This subject is treated more fully in Chapter XLIV.

§ 365. Implied Trusts

In some cases where the language will not create an express trust, the court will imply a trust from the intentions of the creator. It often happens in a will that a testator will leave

[5] Matter of Carpenter, 131 N. Y. 86.

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property to a legatee and then add a wish, a hope, a desire, or a request, that the legatee will give or transfer a certain portion to someone else. If it seems to the court that the intention was to impose an obligation on the legatee, it will be held to be an implied trust. If, instead, the intention seems to be merely to suggest a gift, leaving it to the discretion of the legatee, no trust will be implied. (See Chapter XLV, "Implied Trusts.")

A resulting trust arises when property is purchased in the name of a party who did not own the purchase money. If a trustee took funds that he had in trust and bought land in his own name, a court of equity would imply a trust for the benefit of the one for whose benefit the funds were held. This case of property deeded to someone other than the owner of the purchase money occurs not infrequently, and the rights of the true owner are saved by the device of a resulting trust.

Another form of implied trust is where a fraud has been perpetrated and to rectify it the courts declare a constructive trust for the benefit of the person defrauded. If a guardian bought in the property of his ward in fraud of the ward's rights, the courts would imply a trust and decree that he held it as trustee for his ward. This class of trusts arises in many forms and illustrates the wide range of the powers of a court of equity in correcting fraud.

§ 366. Duration of Trusts

A private trust, that is, a trust for a man's family or dependents, that concerns only a few private persons, is limited in its duration. It is not regarded as advantageous or for the public good that property should be tied up and withdrawn from sale for long terms of years or in perpetuity. The usual limit on the duration of a private trust is a life or lives in being and twenty-one years more.

When as in New York express trusts in real estate cannot be made for a term of years, but must be made for the life

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or lives of some persons living when the trust is created, the attempt to create a trust for a definite number of years is void and the trust fails.[6] The direction in the statute prohibits any suspension "by any limitation or condition whatever, for a longer period than during two lives in being at the creation of the estate."

A public trust is one for the public good, for education, hospitals, religious institutions, or charity. Such trusts as these are not limited as to duration but may continue indefinitely. This subject is considered at greater length in Chapter LIII.

§ 367. Powers of Trustees

It is not uncommon for land to be left to trustees, in trust, to sell and invest the proceeds in good, income-producing stocks, the income to be paid over, etc. In such case the exercise of the power is imperative, and must be carried into effect. In other cases the trustees are given an optional power, which they can exercise or not at their discretion. For instance, it might be provided that "said trustees may at their discretion sell the securities included in the trust property and buy other securities with the proceeds, and in the purchase of such other securities shall not be limited to securities by statute prescribed for savings banks and trustees."

In New York the statute prescribes that every trust power must be exercised unless its execution is made to depend on the will of the trustee.

§ 368. "Trusts" as Meaning a Trade Monopoly

With many the word "trust" has an opprobrious meaning in consequence of its popular use as a designation for any kind of trade monopoly. The first large aggregations to control industry were formed by uniting under one management

[6] Garvey v. McDevitt, 72 N. Y. 556.

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practically all the important corporations engaged in the particular line, in what was literally a trust. A board of trustees was selected, composed of the shrewdest managers in the industry. Then, enough shares of stock to control each of the corporations concerned were made over to this board under a uniform trust agreement, in trust, to vote the same, to receive all profits, and to pool the same and pay over the proportionate share of the profits to each of the persons who had placed his stock in the hands of the trustees. The board of trustees elected their own men as directors of the controlled corporations and dictated their management so as effectually to prevent competition. The arrangement, the disregard of public interest, and the high-handed suppression of competitors, caused much indignation. The courts soon dissolved the trusts and directed the distribution of the stocks held in trust.[1] Those interested in monopolizing industry were forced to seek other forms of combination, which they did, but the name "trust" unfortunately continued to be attached to these new forms though they were not in any sense "trusts," and so a majority of the people in this country attach an unpleasant signification to the word.

Review Questions

1. What is a trust? What are the parties to a trust? What may be held in trust? What is the distinction between the legal and equitable estate? In what courts are suits relating to trusts brought?
2. Did the common law recognize trust estates? How were trust estates established?
3. What resulted from the king's chancellor taking jurisdiction of cases that the common law would not relieve? Is equity procedure simpler than common law procedure? In your state, do the same courts try both law and equity cases?

[1] People v. North River Sugar Ref. Co., 121 N. Y. 582; State v. Standard Oil Co., 49 Oh. St. 137.

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4. Under what system are suits relating to trusts bronght? What kind of title has the beneficiary of a trust?
5. What kind of title has a trustee? If the estate is land, in whose name would the deed be recorded? If there are several trustees, what effect would the death of one have?
6. What title has the *cestui que trust*? How can he be prevented from selling his interest?
7. What is a common reason for creating a trust? What is the instrument by which a trust may be created? Who would be likely to be selected as a trustee? When would a court of equity interfere? What could such a court do? Who may make a trust?
8. How are trusts created? What is a testamentary trust? What is a voluntary trust?
9. What is an express trust? What is an implied trust? How are express trusts in land created? Why? Can an express trust in realty be created by parol?
10. When is a trust implied? When is a resulting trust implied? When is a constructive trust implied?
11. Why is the duration of trust estates limited? What is the limit in your state? Can a trust for a specified term of years be made in your state? What is a public trust? Are these limited in duration?
12. What are the usual duties of trustees? When are such duties imperative? When optional?
13. How did the word "trust" come to be applied to a combination to restrict competition?

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CHAPTER XLI

WHY TRUSTS ARE FORMED

§ 369. The Objects of Trusts

Most of the trusts created are formed for a specific purpose, and when that purpose is accomplished they terminate. Their duration in most of these cases is limited by the fulfilment of their purpose. These general objects may be enumerated as follows:

1. To furnish an income for the life of the creator or for the life of his wife, or for the life of his widow, or for the life of some other relative or dependent. All such trusts would end with the death of the beneficiary.

2. To provide for minor children, till of age. All such trusts would end with the coming of age of the beneficiaries.

3. To provide an income for life, to children, grandchildren, or other relatives. All such trusts would be for the life of the beneficiaries, and could be extended thereafter until the youngest child of any of the beneficiaries came of age. This gives the general rule that no estate, legal or trust, can be held together for longer than the duration of a life or lives in being and twenty-one years after. This time may be extended in case of a child born after the death of the father, to allow for the period of gestation.

4. To conduct a business. The trust associations of Massachusetts are examples of this kind of trust. They are not limited by the foregoing rule to a life or lives in being and twenty-one years after.

5. To provide a foundation for or an income to be applied to some educational, philanthropic, or religious object.

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In all cases where these objects are allowable, the limitation to a life or lives in being does not apply.

6. To prevent sale or transfer out of family line. The law does not favor this object and the rule applies.

7. To accumulate rents, profits, or income. The law does not favor this object and the rule applies.

§ 370. Trusts to Hold Property in Family

Men have always desired to keep property in their families, and so insure a continuance of the family line. To this end they have tried to entail legal estates, so that improvident and reckless members of the family could not sell, mortgage, or part with the lands. The courts have always opposed this tendency and devised methods to break the entail, and now it is not possible to leave real property so that it cannot be sold or taken by creditors for more than the limited period of lives in being and twenty-one years after. If an estate is left to a man's children for life and after that to their children when or as they come of age, the limit has been reached and even then the life estate may be sold or mortgaged by the life tenant; or if he cannot pay his debts, his creditors may have it sold. This is the law as to ordinary legal estates, and when the rules as to equitable or trust estates are examined, they are found to follow the law. Hence, it is not possible to hold property together any longer by means of a trust estate than when limitations are imposed to restrict the sale of the legal estate.

It is possible in some states to make what is called a "spendthrift trust," whereby the income of property in the hands of trustees may be paid to a person, and he be restrained from anticipating it or from assigning it, and his creditors are not allowed to take it to satisfy his debts. Where there are no statutes of this kind, it may be provided that the income shall be paid to the beneficiary during his life, or until he tries to

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sell it, or becomes bankrupt. In trusts of this kind it must be provided that on the happening of either contingency the trust income goes to the next beneficiary or to some other person or object during the life of the beneficiary who loses it.

It is possible to provide for married women, for children, and for those incompetent to manage their own affairs, by leaving property in trust for their benefit, without fear of its coming to an end before their death; but a trust income for anyone of sound mind and age may be sold by him or can be taken by his creditors, unless, as has been stated, it is prescribed that the trust income is to go to someone else when the beneficiary alienates his estate or becomes a bankrupt.

While the foregoing is a general statement of the law, some states have repudiated it, and in those states provisions against anticipation or assignment and provisions against any liability to creditors have been sustained. Among these states are California, Massachusetts, Missouri, Pennsylvania, and others. In some states statutes provide that trusts shall be exempt from liability to creditors, unless the debtor himself created the trust.

Another exception is where a trust income is to be used at the discretion of the trustees for the benefit of a person and his family or for the support of the party and the education and maintenance of his children. In such case, the party cannot assign the income, nor, if he becomes insolvent, can his creditors reach it. In any cases of this kind competent counsel should be employed to draft the instrument that creates the trust, and the statutes and decisions of the particular state should be carefully examined.

§ 371. Trusts to Accumulate Income

Not infrequently property has been left to trustees, to accumulate the income for a period, and then to bestow the increased estate on some living descendant. Originally, the only

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limit on bequests of this kind was the general rule of a life or lives in being and twenty-one years more. A man named Thelluson in England contrived to combine the limitations so that his estate, amounting to some $3,000,000, would accumulate for from seventy-five to one hundred years, at which time it was to go to some remote descendant, who would have been the richest man in England. The plan did not meet with approval and Parliament cut down the period for which accumulation would be allowed.[1]

In this country many of the states have cut short the period; where this has not been done, the common law period as given would prevail. In New York and some other states no accumulation for a longer period than the minority of one or more persons "then in being" is allowed. In each state it would be necessary to investigate the local law. An accumulation for a charitable purpose would be subject to any statutes on the subject.

§ 372. The Rule Against Perpetuities

Men who have secured property generally want to hand it down to those of their own blood. From king to peasant farmer, it is human nature to desire that what they have owned shall go on down to their descendants and not into the hands of strangers. By will or by operation of law, their property will go to their descendants. It would continue to descend in this way if their descendants would keep possession. If each generation would instil habits of care, thrift, temperance, and foresightedness into the children, who make the next generation, estates would not be wasted and dissipated. In some

[1] H. G. Wells, in "When the Sleeper Wakes," has made use of the law on this subject. The hero, a young man of large property, falls into a protracted cataleptic sleep. By his skilled physicians he is kept in a glass compartment at an even temperature and is supplied with nourishment and pure air. As the trance continues, a board of able trustees is appointed to manage his wealth. He remains in this dormant condition for a couple of centuries, at the end of which period his estate has absorbed all the existing wealth of the world and his trustees form a plutocracy that rules the earth. Then he wakes and the story begins to get exciting.

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families this is successfully done and the members keep their position, stations, and traditions for generation on generation. In most cases, though, fortunes are dissipated and scattered and are rarely if ever accumulated again.

Instead of perpetuating family position by instilling the virtues that make for perpetuity, men have tried in many ways to leave their property so that their heirs cannot sell or transfer it to others. Estates are lost by voluntary alienation—that is, sale by the owner—or by involuntary alienation—that is, sale by the creditors. Wherefore those by whom the estates were established tried in many ways to restrain alienation. If it were possible to do this, the resulting estate would be a perpetuity. A perpetuity has been described as an estate that could not be alienated, even though all mankind joined in the deed.

It has generally been held that it is not good for mankind to hinder the free alienation of property, that it is not good for families to be kept wealthy when they lose the ability to care for their wealth, and that it is not good for the rest of the community to have property tied up and not moving freely from hand to hand. The law has always abhorred a perpetuity. It has been said that "a perpetuity is a thing odious in the law, and destructive to the commonwealth; it would stop commerce and prevent the circulation of property." [2]

Our rule against perpetuities comes to us as the result of the continued effort of the landed families in England to tie up their property and keep it in the family, and the efforts of the courts to abridge and curtail these attempts. As is the case with other expedients, it is a compromise.

The rule broadly stated is that no estate can be held from alienation for longer than a life or lives in being and twenty-one years after, and in case of a posthumous child, who would

[2] Duke of Norfolk's Case, 1 Vern. (Eng.) 164.

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inherit, at most nine months longer. At the end of the period limited, the heir or heirs who take may alienate or mortgage or dispose of the estate at their pleasure.

At the present time large estates are more likely to be broken up by heavy inheritance taxes and division among numerous devisees and legatees.

§ 373. Trusts for Charity

"Charity" in this sense has a broad meaning. It includes all institutions designed to help, to raise, to educate, or in any way to do good to men. It takes in refuges, asylums, hospitals, schools, colleges, libraries, churches, and associations and organizations of all kinds to promote education, useful arts, or religion.

Many men when they make their wills desire to leave some of their wealth broadly to help their race. Where the amount so left is large, and no existing institution is satisfactory, it is common to leave money and property to a board of trustees, in trust, to apply the principal or income to the promotion of whatever cause or causes the testator had most at heart.

The most conspicuous examples of this form of trust are the great foundations under the names of Russell Sage, Carnegie, and Rockefeller. The Smithsonian Institute and many of our colleges and universities are similar trusts.

Many hospitals and libraries and homes for orphans and the aged have been formed in like manner.

After an institution is once started in this manner, others may make gifts or leave legacies to the same board of trustees, in trust for the same purposes. Then gradually these trust funds may become of large amount and their conduct and control may easily involve the maintenance of a large organization.

It should be said that the rule against perpetuities does not apply to funds left for the maintenance of a charity.

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Review Questions

1. What are the more usual objects of trusts? What is the effect on the trust when the object has been fulfilled? What legal limit is there in your state to the duration of personal trusts? Is a trust for business purposes so limited? Would the limitation apply to a charitable trust?
2. What is meant by "entail"? In your state how long can an estate be kept in the family? Is there any difference as to duration between a trust estate and a legal estate? Can a spendthrift trust be created in your state?
3. Do the courts favor accumulation of income? What is the rule in your state?
4. What is a perpetuity? What is the economic objection to perpetuities? What is the attitude of the law? What tends to break up large estates now?
5. What is the legal meaning of "charity"? What charitable trusts do you know of? Does the rule against perpetuities apply to charitable trusts?

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CHAPTER XLII

PARTIES TO TRUSTS

§ 374. Who May Create a Trust

It may be broadly said that everyone who is competent to make a will or to enter into a contract is competent to create a trust. Ownership of property and power to transfer it are all that is required to make a trust. If any solvent person has full title to property and has capacity to contract, he can transfer the legal title to a trustee and either retain the equitable title himself or transfer the equitable interest to someone else.

A person who is insolvent could not create a trust that would put his assets out of reach of his creditors. A person incompetent to contract by reason of minority, lunacy, or some other incapacity, could not, as a rule, create a trust that would bind him. The trust so created would be voidable.

Married women are practically under no disabilities in this country and may create trusts at their discretion.

The state itself, by legislation or by its duly authorized officers, may create a trust, convey property, and appoint trustees.[1]

§ 375. Corporations May Create Trusts

An individual has unlimited powers and may engage in any business or do any other thing he desires to do. A corporation is an artificial being created by the law of the state, and its power is limited by its charter. It may engage only in such business as its charter specifies and may do only those things

[1] Perry on Trusts, § 30.

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that tend to promote and carry out the particular undertakings so authorized. A corporation may enter into contracts and may sell or mortgage its real and personal property so far as is necessary to carry out its corporate purposes. If the creation of a trust tended to promote the purposes for which the corporation was created, it could undoubtedly lawfully create such a trust and its action would be sustained. There are not many cases, however, where the creation of a trust would be an appropriate corporate action, and the question of corporate capacity to create a trust seldom arises, except in those cases where it executes a deed of trust to secure its bondholders. In such cases, the trustee is usually a trust company, and the law governing is not relevant to the purposes of this part, which deals only with the law of voluntary and testamentary trusts.

§ 376. Trusts Created by Minors, Lunatics, or Aliens

A trust created by a minor is good until the infant chooses to repudiate it, as is the case with the sale of his own property by a minor. If a minor owned property he could create a trust, but he could avoid it whenever he desired, and a court of equity would not hold him to his transfer to the trustee. In any state where minors of a certain age can make a valid will, a testamentary trust so created would be enforced.

A deed or trust created by a person adjudged insane would be void. A deed or trust created by a person not under guardianship and in control of his property would be good until avoided either by the lunatic or one of his friends, or by his representatives. If an insane person had not been declared so by a competent court, he could make a trust and this would be good until made void by the proper court. Courts of equity, however, will not usually avoid a trust so created if the contents are reasonable and fair.

When an alien can hold real estate, he can create a trust and appoint a trustee. The trustee will take whatever legal

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title the alien had, and no more. In some states an alien may hold land only so long as the state does not interfere. Any trustee he might appoint would hold by no better title. An alien can own personal property and deal with it in all respects as a citizen can. He can therefore create a trust of personal property.

§ 377. Who May Be a Trustee

The following statement from an English work sums up the qualifications necessary for a trustee:

> A person to be appointed trustee should be (1) a person capable of taking and holding the legal estate, and (2) possessed of legal capacity and natural ability to execute the trust, and (3) domiciled within the jurisdiction of the court.[7]

Any person or corporation capable of taking the legal title to property may take it subject to a trust and in that case would become a trustee. If afterwards the person or the corporation was not capable of performing or executing the trust, the court of equity having jurisdiction would execute the trust by decree, or it would remove the trustee named and appoint some other who was capable.

> It is a rule that admits of no exception, that equity never wants a trustee, or in other words, that if a trust is once properly created, the incompetency, disability, death, or non-appointment of a trustee shall not defeat it.[8]

In making appointments the court will have regard to the wishes of the person creating the trust, if possible, and would not appoint one who was objectionable to the creator. Neither would a court appoint a person who was not likely to be impartial as between those interested in the trust, for it is the essence of a trustee's duty to hold an even hand between all

[7] Lewin on Trusts, p. 27.
[8] Perry on Trusts, § 38.

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the beneficiaries. Courts will always have a regard to the promotion of the trust and endeavor to appoint someone who will carry the trust into execution.

§ 378. Corporations as Trustees

At the present day, corporations of every description may take and hold property, as trustees, for purposes not foreign to the objects for which they were created. Corporations are confined by the terms of their charters to certain purposes therein specified, and cannot do things which their charters or the laws of the state do not authorize. On this account they can act as trustees only in such directions as will tend to further the general purposes for which they were specifically created or incorporated.

A corporation acting as a trustee is under the jurisdiction of courts of equity and will be compelled to carry the trusts into execution, and the process of the court may be called for in case of failure.

If a corporation has not been given power by the state to hold lands, it cannot properly hold them as a trustee, but where such is the case it could hold against everyone but the state. In other words, such an act is *ultra vires,* but no one but the state has the right to bring action against such trustee. In some cases of this kind where land is left in trust to a corporation or organization not capable of holding it as trustee, the court will appoint a capable trustee or will enforce the trust against the heir to whom it might go. In other cases such an attempt is null and void and the property goes to the heirs free from the trust. If such a trust is to be created, skilled counsel should be consulted.

§ 379. Other Corporate Bodies as Trustees

Municipal corporations, towns, school boards, and other governmental bodies may be trustees for educational, philan-

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thropic, and public welfare purposes. It would usually be *ultra vires,* that is, beyond the powers of a municipal corporation, to act as a trustee for particular private individuals.

§ 380. Banks and Trust Companies as Trustees

Trust companies are corporations organized for the express purpose of acting as trustees. Any national bank may qualify and is then authorized to take and administer trusts to the same extent as a trust company. The advantages of having trusts under corporate management of this kind are great. The whole subject is of so much importance that Part V of this work is devoted solely to this subject.

§ 381. Unincorporated Associations as Trustees

At common law unincorporated associations cannot be trustees for a charitable purpose. It has been held in New York and Virginia that this rule holds in those states. Elsewhere the English statute that modified the common law is followed and an unincorporated association can take a charitable trust.

§ 382. Capacity for Trusteeship

There was once a question as to the capacity of married women to act as trustees, but the restrictions against married women have been so generally removed throughout the United States tha hey may be considered as no less qualified than married men.

A minor may be an agent and as an agent can act, but should not be named as a trustee. If a minor were appointed, the estate would pass to him and the court would compel him or his guardian to execute the trust or would remove him and appoint someone competent to act.

An alien living in this country could take the personal property as a trustee to the same extent that a citizen could.

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He may take real estate if the state allows an alien to take a legal title. If the alien were domiciled abroad, he would not be within the jurisdiction of any of our courts, and that would probably disqualify him from acting.

A court would not usually appoint a resident of another state a trustee, but the creator of a trust could do so. It might in some cases make it difficult for the beneficiary to enforce his rights.

A lunatic or an habitual drunkard may be appointed trustee, but cannot execute any trust that requires the exercise of discretion. The court may remove such a trustee or the trust may be administered by his guardian. Where a lunatic is made a trustee or a trustee becomes insane, (1) the trust may be administered by his guardian, or (2) it may be administered by the court, or (3) he may be removed and a sane person appointed in his stead.[4]

Bankruptcy would not necessarily incapacitate a person for acting as trustee. His creditors would have no claim, and his bankruptcy would not affect his obligation as trustee. Insolvency, though, may be good ground in some cases for removal.

Beneficiaries should not be appointed trustees, as their duties and interests might conflict. Near relatives and persons closely connected should not be selected, as there might be the same conflict of interests. There is no positive law against such appointments, and sometimes they are made.

§ 383. Who May Be a Beneficiary

Generally, any person or persons who can take a legal title to property can also take an equitable interest and may be the beneficiary of a trust estate.

An alien may be the beneficiary where the trust property is personalty. Technically, objection might be made in some

[4] Perry on Trusts, § 58.

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jurisdictions to an alien being the *cestui que trust* of an estate in land.

Any one of the states or the United States might be a *cestui que trust*. There is no legal rule to prevent. A city or any other corporate public agency could be the beneficiary of a trust. Where, however, private corporations cannot legally hold lands, they cannot evade the law by being made *cestuis que trust* of land. Otherwise, corporations generally may be the beneficiaries of trust estates of all kinds.

Corporations can be the beneficiaries of trusts of personal property to the same extent as natural persons.

Voluntary associations, societies, clubs, etc., may be *cestuis que trust* of trusts of personal property. But though such societies cannot take the legal title to real property, they can at common law enjoy as beneficiaries a trust in real estate.

Charitable associations and corporations, if in a locality where they are not able to take the legal title to land, may nevertheless take the fruits of trusts of both realty and personalty. Such trusts are good even when the property is left in general terms, as, "for the use and benefit of the poor people of Clermont County." In such cases, even if the immediate objects of the trust should fail, equity would select others of the same general class. A bequest for the benefit of "the poor saints" of a locality was held to be too vague to be possible of fulfilment, though the court added that if the testator "had made it plain whom he thought were saints, the Court would enforce the trust."

Review Questions

1. Who may make a trust? What limitations are there on an insolvent person?
2. When may a corporation create a trust?

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3. Would a trust by a minor be good? Would a trust by a lunatic be held good? Can an alien create a trust?
4. What requisites should an individual trustee have? If a person or corporation appointed trustee was not capable of acting as such, what would be done? What rules would govern the court in making such an appointment?
5. What governmental corporations may be trustees? Could any such corporation be trustee for an individual?
6. Can corporations be trustees? What corporations can act as trustees? What might prevent a corporation acting as trustee?
7. What corporations are specially qualified to act as trustees?
8. Can an unincorporated association undertake a charitable trust in your state?
9. Can a married woman act as trustee? Can a minor? Can an alien? Can a resident of another state? What can be done if a lunatic is appointed as trustee? Would insolvency incapacitate a trustee? Can a beneficiary under a trust be one of the trustees?
10. Who can be a *cestui que trust*? Where aliens or corporations cannot hold land, can they evade the law by having a trustee hold it? May a Greek letter society be a *cestui que trust* of a piece of land?

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CHAPTER XLIII

TRUSTEES

§ 384. Appointment of Trustees

Trustees are appointed by various means. Some of these are as follows:

1. By deed or declaration of trust.
2. By will, in which case they are called "testamentary trustees."
3. By agreement.
4. By the court.
5. By implication of law.
6. By self-perpetuating boards.
7. By the exercise of the power of appointment.

When a voluntary trust is created by deed or declaration of trust, the creator names the trustees in the instrument. The creator should know beforehand that the proposed trustees will accept. The same or greater caution should be exercised in naming a trustee in a will, because in case the trustee declines the appointment, the testator cannot appoint another.

In appointing trustees as a business arrangement, the same care should be used as in naming directors for a new corporation—men must be chosen who are interested and who have some knowledge and skill in the conduct of the particular business.

A man may make himself a trustee by declaration of trust made or published, or by delivery of the income from the estate which he holds as intended trustee, to the beneficiary in pursuance of the trust.

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The court will appoint a trustee where a trust may fail for lack of a trustee, or where a named trustee refuses to serve or has died, or where a vacancy from any cause exists and no other means have been provided for filling the vacancy. In all matters pertaining to testamentary trusts, the court of probate exercises jurisdiction and appoints trustees to fill vacancies. In other trust matters, a court of equity would exercise the power to appoint needed trustees.

In all cases where a trust is implied, it involves the appointment of a trustee who may not disclaim or resign, but is forced to act. (See Chapter XLV, "Implied Trusts.")

Where a trust is to endure for some long period, as when a charity or educational organization is founded, the board of trustees is often given the power of filling vacancies as they occur. The result is a self-perpetuating board. (See § 389.)

Where the creator or testator provides a method of filling vacancies as they occur, the power must be exercised by the persons and in the precise method prescribed. (See § 390.)

§ 385. Rules for Appointing Trustees

In appointing trustees, courts of equity will in general be guided by the following rules:

1. The court will try to carry into effect the wishes of the creator of the trust, so far as these are indicated in the instrument creating the trust or can clearly be inferred from it.

2. The court will not appoint a trustee in the interest of some of the beneficiaries or a trustee who was not desired by the testator, or one who is opposed to the interests of some of the beneficiaries. A trustee should look equally after the interests of all and should not be biased for or against any member or class of members of his *cestuis que trust.*

3. The appointment will be made to promote and make the trust most effective, and to carry the trust into execution is the main purpose of the appointment.

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§ 386. Acceptance or Disclaimer

No man can, by any express trust, be made a trustee against his will. Even if he has promised to act as a trustee, he may refuse if he finds that he cannot undertake the responsibility. If a trustee does not mean to accept, he should disclaim positively in writing so that there shall be no doubt as to his attitude. A trust may in some cases be disclaimed in open court by counsel.

A trusteeship created by deed or declaration of trust should have an acceptance clause as part of the instrument, and this, signed by the trustees, would make the best possible evidence of acceptance.

Where a trust is created by will, an executor and trustee will accept by qualifying and acting as executor. In most states of the Union, executors and trustees are required to give bond before acting. Where this is the case, the filing of a bond would be an acceptance, and failure to give bond would be a disclaimer. If there were no statutes as to bond, the probating of the will by the executor and trustee would be an acceptance of the trust.

If there is no formal acceptance of a trust, acceptance may be presumed from acts of the appointee. Oral evidence of what a trustee has said or done or admitted may be used to prove his acceptance. If an appointee does anything in regard to the trust property, it will be evidence of acceptance.

If, in any trust, funds or property are transferred to the trustee with his acquiescence, this would be evidence of acceptance. A trustee will not take title to the property unless he expressly or impliedly accepts the office tendered him.

§ 387. Executors Acting as Trustees

If a testator intends to appoint a person both executor and trustee under his will, he should make it clear, for the offices may be so distinguished that acting as executor might not

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make him trustee. If by the terms of the will the executor is to keep the property or a portion of it as trustee, his bond as executor will hold as security for his conduct as a trustee until he takes over the property as trustee and gives bond in that capacity. Whenever the will distinguishes between the duties of the executor and the subsequent duties as trustee, there should be a separate bond given, even though the same person was both executor and trustee.

In some states it is required that where the same persons are executors and trustees under the will, they should settle and render final account as executors before they assume their duties as trustees. Under some circumstances, the trustees are entitled to compensation distinct from, and in addition to, their fees as executors. (See § 461.)

§ 388. Removal or Resignation

After a trustee has accepted he is held to the performance of his duties until his office is terminated, which may be in any one of the following ways:

1. Removal by a court having jurisdiction.
2. Resignation by permission of court or by concurrence of all interested.
3. Discharge and substitution by the method, if any, indicated in the instrument creating the trust.
4. By death.

The courts will remove a trustee and appoint a successor where there is negligence, bad faith, or want of capacity. The courts will not act hastily in such matters, and are justified in using their sound discretion. The courts will remove trustees where there is a real danger that the trust funds will be lost or placed in jeopardy.

Bankruptcy would not disqualify an executor or a trustee

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nor affect the trust estate in his hands, and his discharge in bankruptcy does not release him from his obligations under the trust. Also in this country trustees are required in most cases to give bond for the security of the trust fund. In some cases, however, insolvency is a good reason for removal or resignation.

There are many cases where it is better for all concerned to accept a trustee's resignation and allow the court to substitute someone else. A trustee has no right to resign and it may be done only with the permission of the court or by the consent of all the *cestuis que trust,* assuming that they are all capable and of age to consent.

The proceedings for removal would have to be conducted by competent counsel and all persons interested would have to receive notice. It may be a troublesome and costly proceeding.

It is possible for the creator of a trust to provide for the removal or the resignation of a trustee or trustees and for the appointment of others. This subject is discussed in the next sections.

§ 389. Self-Perpetuating Boards of Trustees

In the case of charities and of educational and altruistic trusts, it is common to provide that vacancies as they occur shall be filled by the remaining members of the board, so that in effect the trustees are self-perpetuating. There are advantages in this plan and also grave disadvantages. It may in most cases be better to provide that certain outside bodies interested in the general purpose, should elect at least a portion of the board, and fill vacancies as they occur.

> Every well-drawn instrument, creating trusts intended to continue for any considerable time, should contain authority and power for any of the trustees to relinquish the trust, as well as provisions for filling vacancies occasioned by resig-

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nation, death, or incapacity. Such provisions save the cost and trouble of constant applications to courts. In framing these powers, great care should be taken to provide for every possible contingency in which a resignation or new appointment may become convenient or necessary. The power should clearly express the cases in which new trustees may be appointed, and embrace every event which can render such an appointment necessary or desirable, as the death of all, any one, or more of the original or substituted trustees, their absence from the country or state, their wish to resign, their original refusal to accept, and their future incapacity or unfitness to discharge the duties; the instrument should also point out clearly and by whom and in what manner the new appointments are to be made. Such provisions are extremely convenient, and save much perplexity, expense, and trouble.[1]

§ 390. Powers to Appoint

The duties and powers of trustees cannot be delegated to others, unless there is express authority for that purpose given in the instrument creating the trust. It follows, that a power to appoint new trustees can seldom or never exist, except in express trusts created by deed or will. The person who creates the trust may mould it into whatever form he pleases; he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power; and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuance of the trust.[2]

Where a trust is to endure any length of time, the creator should explicitly state how trustees may withdraw or be removed, and how vacancies are to be filled in order to avoid the expense and trouble of application to the court. Such power to appoint new trustees may be given to any of the following:

[1] Perry on Trusts, § 288.
[2] Perry on Trusts, § 287.

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1. The surviving or remaining trustee or trustees.
2. The beneficiary or beneficiaries who are of age.
3. Any other person or persons.

The instrument should also provide explicitly as follows:

1. The time, occasion, or event that will vacate a trusteeship.
2. The persons who may be appointed to fill the vacancy.
3. The manner of making the new appointment.

Review Questions

1. How are trustees appointed? In a voluntary trust or testamentary trust, who names the trustees? How can a man make himself a trustee? If an appointed trustee declines to act, what is done?
2. If a court appoints trustees, what does it try to do?
3. Can a man be made a trustee of an express trust against his will? How can he avoid serving? How can he accept? If a trustee takes over trust property, what is the effect?
4. Why should the duties of an executor and a trustee be distinguished?
5. How may a trusteeship be terminated? When may a trustee be removed? Would a trustee be removed for insolvency? Can a trustee resign at pleasure?
6. What is a self-perpetuating board? Against what contingencies should a trust instrument provide?
7. Who may be authorized to fill vacancies? What other provisions may be made?

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CHAPTER XLIV

EXPRESS TRUSTS

§ 391. Declaration of Trust

It is usual to create a trust by an instrument in writing called a "declaration of trust." The general rule is that a trust may be created by word of mouth if it concerns only personal property. In Georgia this is not the case.

Nearly every state has enacted the Statute of Frauds, which prescribes that all instruments transferring a trust or confidence in lands shall be evidenced by some writing signed by the creator or that such transfer be created by his last will in writing. The statute does not apply to a trust of personalty, but a trust of any kind should be shown by a written instrument.

The instrument creating a trust may be a will, a trust agreement, or a declaration of trust. For an example of a trust instrument see Form 7.

§ 392. A Trust Instrument Cannot Be Partly Oral

A written trust agreement of any kind cannot be varied by oral evidence. A trust created by will is subject to the rules governing wills, by which a will cannot be affected by other evidence as to the testator's intentions.

What is called a "latent ambiguity" in a will can be explained. That is, if a trust were created in favor of Henry Brown of Salem, and it were claimed by two parties of that name, evidence could be adduced to show that one was a friend and the other was a transient acquaintance.

If, however, the language was ambiguous and it was doubtful whether or not a trust in favor of Henry Brown had been

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created, that would be a patent ambiguity and could not be explained by oral evidence as to what the testator intended, but would have to be construed by the rules of legal interpretation.

In any case, where an express trust relative to lands is to be proved, it must be established by written evidence and cannot be varied by oral evidence.

§ 393. Testamentary Trusts

Any trust created by will is a testamentary trust. It is the commonest form of trust. Its object is usually to provide a safe income for dependents with no risk of losing the principal. The property, clearly described and indicated, is left to the trustee or trustees by the usual words of bequest or devise, and then are added the words "in trust" or "to hold the same in trust," and then follow any words necessary to describe the *cestuis que trust* and to prescribe how the trust is to be administered, what disposition is to be made of the income, and how the trust is to be terminated. Any special powers or specific directions should be clearly and briefly set forth, such as to:

> Sell said real estate at public or private sale at such time or times and on such terms as in the discretion of said trustees shall be best and the proceeds of such sales shall be invested in properly diversified preferred stock and bonds of established industrial and transportation corporations and said trustees may sell any such securities, and may reinvest the proceeds at their discretion and shall not be responsible save for negligence or bad faith.

In regard to any such trust, it is necessary that the will by which it is created shall conform to the laws of the state in which the land is situated. If these formalities are not observed, the will cannot be admitted to probate and in such case the trust fails and is a nullity. The trust in all such cases depends on the validity of the will.

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Any testamentary trust should be clearly set forth and all essentials should be given so that there may be no confusion as to the property, the trustees, the *cestui que trust,* the effect of the trust, or the final disposition of the property.

§ 394. Voluntary Trusts

A man before he dies may make a voluntary trust for the benefit of his dependents, for any educational or philanthropical institution, or for himself. If it is personal property, this is done by executing a declaration of trust, if real property by executing a deed of trust. The term "voluntary trust" implies that the creator of a trust acts voluntarily, of his own initiative, and not for a consideration or because of a contract obligation. In case of a voluntary trust, it does not become binding until it is executed and carried into effect. A declaration of trust in shares of stock and bonds would not take effect until they had been turned over by signatures and transfer. A deed of trust would have to be executed with all the formalities pertaining to conveyances of land and delivery to the trustees or record on the public register. After a trust has been executed in this manner, the fact that the trustee [1] refused to act would not defeat the trust. A court of equity will not allow a trust to fail for want of a trustee, but will remove one who will not do his duty and will appoint one to fill any vacancy, however caused. For a form of deed or declaration of trust see Form 7.

§ 395. Reserving the Right to Revoke a Trust

A voluntary trust, as its name implies, is not a matter of obligation, but having once been carried into effect and the trustee having been placed in possession, it is an executed trust and cannot be recalled, save by the voluntary assent of both the trustees and the *cestui que trust.*

[1] O'Neil v. Greenwood, 106 Mich. 572.

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In some cases there is trouble in telling when a trust has been perfected so that the creator cannot recall it. There is some conflict in the decisions on this point. When a deed of trust has been executed and delivered and nothing more remains to be done by the grantor, the trust is complete and beyond recall. In case of stocks and bonds, a duly executed transfer and delivery to the trustee would complete the trust. A deposit in a savings bank in the name of the depositor as trustee for a named beneficiary, accompanied by notice to the beneficiary or to somebody representing him, would be sufficient to create a trust. A voluntary deposit of one's own funds nominally as trustee for another, but without notice to that other, will not create a trust. In New York it is held that such a deposit without notice to the beneficiary could be revoked at any time before death, but that at death the gift would go to the beneficiary. A delivery of the pass-book to the beneficiary at any time would pass the title and end any right to revoke.

In all such cases the creator should do whatever he intends to do, positively and completely. If such an arrangement is not to be permanent, the creator of the trust should reserve the right to revoke it. If this is done, the trust may be terminated at any time during the life of the creator. The usual language in such cases is "reserving, however, the right to revoke and recall such trust at any time during the life of said grantor." Any language that expressed clearly the same intention would suffice.

A man may create a trust for himself, the funds being placed in the hands of a financial corporation, usually in trust, to pay the income of the same to the creator during his life and after his death to other beneficiaries, or at his death the whole property to be transferred to persons or institutions designated by the creator of the trust. The power to revoke should be expressly reserved if it is so desired.

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§ 396. Revoking a Trust

A completed trust cannot be revoked without the consent of all the beneficiaries, unless the right to revoke has been expressly reserved. If some of the *cestuis que trust* are not yet born or are not of age, the trust cannot be revoked for lack of their consent.

If there is any reason for believing that the creator of the trust was unduly influenced or was wrongly advised, or that the power of revocation was omitted by reason of fraud, accident, or mistake, a court of equity will set the trust aside.

If a power of revocation has been reserved, it must be exercised as prescribed, but if merely the right to revoke is reserved to the creator of the trust, he should revoke by an instrument equal in formality and dignity to the instrument by which the trust was created.

§ 397. An Agreement to Create a Trust

If a contract were entered into for a valuable consideration, to create a trust for the benefit of the party giving the consideration or for a third party, the contract would be enforcible and the party obligating himself would be compelled to carry out the agreement. In such case the resulting trust would not strictly be a voluntary trust, though in effect it would be the same.

When there is no consideration, equity will not enforce a promise or an executory trust.

§ 398. Trustees to Carry out Subscription Agreements

Another case of a contract trust is where several parties agree to contribute specified amounts to trustees to form a corporation to build a church, or even to carry out some business operation. In all such cases the contract is a legal contract and can be enforced as any other contract is enforced.

The trust so created is an express trust, the terms of which

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may be set forth in the contract to create the trust or in a further instrument signed by the trustees. The interest of the *cestuis que trust* may be evidenced by transferable certificates signed by the trustees and based on the formal trust agreement. Such a trust was the original Standard Oil Trust, which was declared illegal only because of its illegal purpose—to restrain competition. Such a trust for a legal purpose is not uncommon and has some advantages as a means of business association, whereby the creators and *cestuis que trust* can invest their means and at the same time avoid partnership liability. They have been most extensively used in Massachusetts for associations holding real estate.[2]

Review Questions

1. What is a declaration of trust? In what two ways may a trust in land be created?
2. Can a trust in land be partly written and partly oral? What is a latent ambiguity? What is a patent ambiguity?
3. What is a testamentary trust? What is its usual object? Outline its form. Phrase directions to sell land. To invest the proceeds in securities.
4. What is a trust made before death called? Why is the word "voluntary" used in this connection? How would a deed of trust be executed? According to what laws should a deed of trust be executed?
5. Can a man be compelled to execute a declaration of trust? Can a declaration of trust be revoked? In your state, how could a savings bank deposit be made an effective trust for another? How can a power to revoke be reserved? How can a man create a trust for himself? Can such a trust be revoked?
6. How can a complete trust be revoked? When will a court of

[2] If the reader desires to study this phase of the subject further he can consult the following later works: Thompson, Business Trusts as Substitutes for Business Corporations; Wrightington, Unincorporated Associations; Sears, Trust Estates as Business Companies; Chandler, Express Trusts Under the Common Law; and Wilgus, Corporations and Express Trusts as Business Organizations (an article in 13 Mich. Law Review, p. 70).

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equity set a trust aside? Where a right to revoke has been legally reserved, how should it be exercised?

7. Can a binding agreement to execute a trust be made? Will such an agreement be enforced? What may make it void?
8. May trustees enforce subscription agreements? May this form be used to create a business organization? How may the interests of the subscribers be evidenced? Where has this form been used extensively?

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CHAPTER XLV

IMPLIED TRUSTS

§ 399. Trusts That Are Implied

In contradistinction to express trusts, there are cases where the courts imply a trust: (1) from the language used, or (2) from the circumstances, or (3) to remedy an attempted fraud. These three cases of implied trusts are outlined as follows:

1. Trusts implied from the language used. These are known simply as "implied trusts." Implied trusts, proper, are "trusts that the courts imply from the words of an instrument where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust." [1]

2. Trusts resulting from the circumstances. These are termed "resulting trusts." "A 'resulting trust' is a trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction." [2]

3. Trusts construed by the courts to remedy an attempted fraud. These are known as "constructive trusts." "Constructive trusts are forced by the courts upon the trustee for the purpose of working out right and justice or frustrating fraud. They have none of the elements of an express trust, but arise entirely by operation of the law without reference to any actual or supposed intention of creating a trust and often directly contrary to such intention." [3]

Excepting only the first class, the subject matter is out-

[1] 39 Cyc. 26.
[2] 39 Cyc. 27.
[3] *Ibid.*

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side of the purposes of this book, and the two classes, resulting and constructive trusts, are here touched upon only to round out the treatment of the general subject as a whole.

§ 400. When a Trust Is Implied

There are many cases where the courts imply a trust from the nature of the transaction and from the words used. If in any case it can fairly be implied that a trust arrangement was intended, the courts will enforce a trust. Usually such trusts arise from the use of what are called "precatory" words in wills. It happens many times that a testator makes a bequest to someone and adds, "I desire," or some other words indicating the same thing, that the legatee shall pay the income or a part of the income or a special sum of money to another. In most of the states any such expression is held to show an intention to create a trust, and the implied trust will be carried into effect by declaring the first taker a trustee for those whom the testator desired to benefit.

The following words have been held to justify an implied trust: "wish and request," "entreat," "most heartily entreat," "authorize and empower," "recommend," and "trust and confide." Such language is held to show an intention that a trust should be created. The words are held to be a polite form of command rather than merely a request.

The question is always: What was the intention of the testator? And if this intention can be gathered from the will, no such trust estate will be implied. Where the intention is not clear, and to imply a trust is likely to bring to pass what the testator desired, a trust will be implied.

§ 401. Wills Should Avoid Ambiguity

If a testator intends to create a trust he should do so by using the usual words "in trust," and should thus make sure that there is no doubt as to what he really means. If instead he

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wishes to leave it to the discretion of the legatee and not to create a trust, it is a simple matter so to express it. It is also easy to express a wish or request in ambiguous shape, thereby giving the court much trouble in deciding whether or not it creates a trust, for:

1. Precatory words may create a trust.
2. Discretionary expressions may prevent a trust from being implied.
3. Failure or uncertainty in the object may be an element that will prevent an implied trust.[4]

The testator should point out the objects, the property, and the way in which it is to go, so clearly that his intention cannot be doubted.

Trusts are sometimes implied when property is given to a parent for the care and maintenance of his family or children. This is a peculiar form of trust, for the amount to be used for the beneficiaries is uncertain and the trustee is entitled to any residue.

Where a legacy is left to a person to buy a house, to start a business, or to pay his way through college, the legatee takes it absolutely, and free of any trust, and may apply it to other purposes. A court cannot supervise expenditures.

It is worth while to repeat that definiteness in all matters affecting money or property saves much trouble. A few well chosen words will save costs, litigation, and possible failure of a good plan.

§ 402. Resulting Trusts

A resulting trust is a trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction.[5]

[4] Hill on Trustees (4th Am. ed.), p. 73.
[5] 39 Cyc. 26.

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When in order to do justice it is necessary to imply a trust, it is a resulting trust; that is, from the circumstances a trust results.

If a trustee used trust funds to purchase real estate in his own name, it is presumed that he holds it as a trustee for the original *cestui que trust*. A trust results from his action.

If a partner uses the firm funds to buy a piece of land, and he takes title in his own name, there is a resulting trust in favor of the partnership.

If an estate is taken in the name of one person, while the price is paid by another, there is a resulting trust in favor of the person who furnished the price, unless there is some good reason otherwise to explain the transaction.

§ 403. Constructive Trusts

Under certain circumstances of fraud, the courts, to right the wrong, construe a trust. That is, a constructive trust is a trust forced upon a party who has obtained property by fraud in favor of the person who has been defrauded.

If anyone, by fraud, deceit, or crooked dealing of any kind, secures a conveyance or transfer of another's property to himself, he will be held to have made himself trustee for the benefit of the one who has been defrauded, and a court of equity will force him to account for income or to do whatever a trustee could be compelled to do in similar case.

If a guardian bought property of his ward, a court of equity would construe it as *prima facie* fraudulent and would make the guardian a trustee of the property for the benefit of his ward. If an attorney had dealings with his client, they would be viewed with suspicion and the attorney might be held to be a trustee. If an agent employed to buy a property for his principal buys it for himself, he will be held to hold as a trustee for his principal. Broadly, no one will be allowed to hold a benefit acquired by fraud or a breach of his duty.

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The cases where this doctrine has been invoked are manifold, and courts of equity avoid closely defining the fraud on which they will act, in order to prevent the ill-disposed from evading the letter of the definition.

> The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense.[6]

Review Questions

1. When is a trust implied? How are implied trusts classified? What are implied trusts, proper? What is a resulting trust? What are constructive trusts? Which classes of trusts are discussed in this book?
2. What are precatory words? "I leave my entire personal estate to my wife Isabel Lloyd, in confidence that she will in her discretion provide an adequate support for my niece Ada during her life." In your opinion, would this be an implied trust? If the widow gave the niece $500 per annum, would a court of equity be likely to increase the amount?
3. How can a testator avoid possible lawsuits and ill-feeling? How can a legacy be left for a special purpose?
4. What is a resulting trust? Give a case where the courts would construe a resulting trust? What is the object of the court in implying a resulting trust?
5. When do the courts construe a trust? Give a case where a trust would be construed. Why do courts of equity avoid defining fraud too closely?

[6] Perry on Trusts, § 170.

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CHAPTER XLVI

THE TRUST PROPERTY

§ 404. Property That May Be Held by a Trustee

> Every kind of valuable property, both real and personal, that can be assigned at law may be the subject matter of a trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust, as a receipt for a medicine, the copyright of a book, a patent right, a trade secret, or growing crops.[1]

Generally, anything that can be bought or sold may be assigned in trust.

§ 405. Personal Property Outside of State

If the subject matter of the trust were a herd of thoroughbred cattle on leased land in Kentucky and these had been left by will to a citizen of New York, in trust for the testator's wife, also a citizen of New York, the trustee would take under the will and would be under the control of the Surrogate's Court of New York. Having jurisdiction over the parties, this court could enforce the execution of the trust.

§ 406. Real Estate Outside of State

If part or all of the trust estate is land in another state, and the trustee is within the jurisdiction of the court, the court will enforce its decrees.

A trust created by a citizen of, say, Massachusetts, by will probated in Massachusetts, would give that probate court the right to regulate and control the administration of the trust estate, though both the trustee and the trust estate should

[1] Perry on Trusts, § 67.

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be in another state, if the trustee were duly served with process. If the trustee were unfaithful or abused his trust, the court in Massachusetts could remove him and appoint a more faithful trustee.

> The residence of the trustee and *cestui que trust* out of the commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills of citizens of this State, and which have been proved and established by the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the Probate Court. If the trustee is unfaithful or abuses his trust, that court has jurisdiction to remove him in concurrence with this court on the application of those beneficially interested in the estate.[2]

As a general rule, the validity of a trust relating to land would depend on the law of the state in which it was situated. If the laws of the state where the land was situated prohibited certain trusts or limited their duration, the fact that the owner of the land lived in another state and that his will was probated there, would not change the law of the locality, nor would the court attempt to abrogate the local law of another jurisdiction.

§ 407. How Courts of Equity Control Trustees

If a court of equity has control over the person of a trustee because he resides in its jurisdiction, it can, when the property forming the subject matter of the trust is without its jurisdiction, compel the trustee to obey the decrees of the court by serving him with process in contempt. Even where a trustee is domiciled elsewhere or removes elsewhere, he may be served with process if temporarily within the jurisdiction of

[2] Chase v. Chase, 2 Allen (Mass.) 101.

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the court and compelled to stay within the jurisdiction until the decree of the court has been performed.

§ 408. The Law That Governs a Trust

Generally, it may be said that the validity of a proposed trust, if of land, is determined by the law of the state where the land is situated, and if the subject matter of the trust is personalty, by the law of the domicile of the creator of the trust. This is, however, a general rule and in any particular case it would be necessary to have the matter looked up by competent counsel. It is not a question upon which a layman, unaided, could well satisfy himself.

§ 409. The Trustee's Estate in Land

The first rule as to a trustee's legal estate is that: "Wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall if possible be implied in the trustee." The second rule is that: "The estate of the trustee shall not be greater than is necessary to the complete execution of the trust." [8]

§ 410. The Trustee's Estate in Personalty

If the subject matter of the trust to be held by the trustee is personal estate, it becomes the absolute property of the trustee and he can deal with it as his own, but is required to give account of his administration.

Review Questions

1. What property may be held in trust?
2. Where trustee and beneficiary are in the same state, may the property be out of the state?
3. When can land in another state be held in trust? What is the law usually as to a trust in land?

[8] Perry on Trusts, § 312.

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4. How can a court of equity enforce its decrees?
5. What is the general rule as to trusts of land and trusts of personalty?
5. What are the two rules as to the estate of the trustee?
7. What control has a trustee over personal property held in trust?

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CHAPTER XLVII

CARE OF THE TRUST ESTATE

§ 411. The Trustee's Duty to the Estate

No man is compelled to act as trustee, but if he does accept the office he will be held to its duties and he cannot evade the responsibility. He may be removed for misconduct, he may be discharged by unanimous consent of the beneficiaries if all are competent to consent, or under some jurisdictions he may resign; but otherwise he must do all that his office requires, and is liable for any negligence or misconduct.

> Trustees will be held to great strictness in their dealings with the estate, but courts will treat them leniently when they act in good faith. A trustee is bound to exercise ordinary care and judgment, and it is no excuse for him that he did not possess them; by accepting a trust, whether gratuitous or not, he undertakes that he does possess and will exercise them.[1]
>
> Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When

[1] Perry on Trusts, § 401.

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> one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence and it is a gross breach of duty—*grossa negligentia*—not to bestow them.[3]

If a trustee allowed his lawyer to handle the trust funds and to check out the payments, the trustee would be liable for any loss that occurred. If the trustee deposits the funds in a reputable bank in his name as trustee and they are lost, he is not responsible, for he has done what a careful business man should do. If instead he deposits in his own name or mingles the trust funds or property with his own, he is responsible if loss ensues.

Whenever property is stolen by burglars from an iron safe or other usual place of safe deposit, the administrator is not liable.

§ 412. A Trustee May Not Delegate His Authority

A trustee may not delegate his duties to another. It is his job and, while he may secure assistance or employ an agent where it is necessary, he is personally responsible if the things done are part of his own duties. If the things on which others are engaged are in the usual routine of business done by special agents, as legal work, banking, the sale of securities, or the like, a trustee is responsible only for securing responsible agents, lawyers of repute, bankers of established credit, and brokers of standing.

Whenever in the due course of business it is customary to act through agents or attorneys, a trustee should do so, and it is not treated as a delegation of his powers. Neither is it a delegation of power to instruct and authorize specific acts to be done. The standard in such cases is the care which "an ordinarily prudent man would exercise in the management of

[3] Hun v. Cary, 82 N. Y. 71.

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his own property," and as such men usually employ agents to attend to ministerial duties, such as to collect their rents, so trustees have a right to employ such agents, and if they exercise ordinary care in the selection of such agents, they are not liable for the defalcation of such agents.

Most particularly is a trustee held to the personal execution of anything left to his discretion. When, for instance, the amounts to be paid for the education and maintenance of a minor have been left to the discretion of a trustee, he is expected to decide the amount himself and not to leave it to anyone else.

§ 413. Trustee May Make No Profit for Himself

A trustee in the United States is entitled to reasonable compensation for his services, but otherwise he is not allowed to make any profit from the trust property for himself, directly or indirectly. The beneficiaries may be women, children, or others not skilled in business affairs. To bar temptation, the rule is absolute and without exception, that a trustee may not use his position as trustee for his own profit. If in any way a trustee receives any gain from his connection with the trust, the courts will invariably make him account for it and give the *cestui que trust* the benefit of it. If a trustee uses trust funds in any business or speculation of his own, he may be required to turn over every cent of profit, and if any loss results he will be required to make it all good.

In such a case the court said:

> When therefore he was elected president of the company by directors whose election he as trustee controlled and allowed them to vote him a large salary as such president, and also allowed them to authorize the payment to him of bills for the legal services which he rendered to the company, he subjected himself to the criticism of using the position that the ownership of the stock held by him in trust gave him to secure to himself this salary and legal employ-

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> ment which resulted in personal advantage to himself. . . . Under such circumstances, we think the surrogate was amply justified in arriving at the conclusion that he did—that the interest of the trust required that the appellant should be removed as trustee.[3]

All persons who stand in a trust relation to others, as partners, guardians, directors of corporations, and agents, generally are subject to this general rule against using their positions for their private profit.

The measure of damages for a breach of trust is, at the option of the beneficiary, the amount actually lost by the breach, or the amount which the trustee has gained by the breach, and where several trustees are involved, each trustee is liable for the whole loss.[4]

§ 414. Trustees' Duty to Take Possession

It is the duty of trustees as soon as qualified to get possession of the trust property and take it into custody. Until the trustees take possession, no profits go to the beneficiaries, but the creator of the estate is entitled to them. Where the trust is created by will, the title of the trustee will relate back to the time of death unless the will provides that the trust estate shall begin later.

When the trust property consists of notes, bonds, and claims against other people, the obligors and those indebted should be notified. If this is not done, and one of the debtors without notice and in good faith pays the debt to the original creditor, he cannot be made to pay again. Any debts due the trust estate should be collected without delay. Any loss resulting from delay could be charged to the trustees who were responsible.

Where property is to be sold, trustees must use their dis-

[3] Matter of Hirsch, 116 App. Div. (N. Y.) 367.
[4] Proprietors v. Force's Executors, 72 N. J. Eq. 56.

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cretion. If there is an expensive establishment that is not to be continued, it should be broken up with the least delay. The widow and family generally have a reasonable time allowed before they leave if it is to be closed up and sold. Because under English law this period was forty days, it was called the "widow's quarantine."

Stocks that are not to be retained are to be sold at the trustees' sound discretion. It is their duty to sell to the best advantage, and they are not required to hurry the sale. To sell within the year or even within the second year has been held to be proper and reasonable. Usually, stock should be sold within the year allowed for settling an estate.

Notes and personal obligations should not be allowed to remain outstanding unless protected by mortgages or other equally substantial securities.

If the trustee himself owes the estate, he must treat his debt as assets collected.

§ 415. Trust Property Must Be Kept Separate

The trust property, when it has been reduced to possession, must not be mingled with like property of the trustee or with like property of any third person. The effect of mingling trust property is as follows:

1. If any loss occurs, the trustee is responsible for any amount that is required to bring the trust fund up to its full amount.

2. The beneficiary may claim all of the mingled fund, and the trustee can claim only what he can identify.

3. If the fund or property is kept separate and with the same degree of care that an ordinarily prudent business man would use in handling his own funds, the trustee is not responsible for any loss that occurs.

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§ 416. The Conversion of Trust Property

The creator of the trust should set out: (1) whether the trustee is to hold the particular property intact during the period of the trust, or (2) whether the trustee is positively to sell certain trust property and reinvest it, or (3) whether the trustee is to use his discretion as to any conversion or change.

Where the instructions are positive either way, the trustee's duties are simple and certain. Where it is left to the trustee's discretion, it is the duty of the trustee to do the best he can as a prudent man of business.

Directions are sometimes given that real estate is to be sold and the proceeds invested in personalty in order that it shall ultimately be distributed as personalty. In such case it is sold as soon as it can be advantageously disposed of. This is one of the certain cases mentioned in (2) above.

> The cases upon the subject in the English and American courts are very numerous. But the general rule is recognized in all of them, that where it unequivocally appears from the will that the intention of the testator was to convert real estate into personal estate, the law will consider the conversion as actually made at the death of the testator, and treat the estate as personal for all purposes to which the intention of the testator clearly extends.[5]

In many wills, positive directions are not given and the trustees or the court must infer from the construction of the instrument what courses will most nearly conform to the purpose of the testator.

A court of equity may order a trust property converted from personal to real property, or vice versa, where it can be shown that it is for the interest of the beneficiary, and where the will does not in terms forbid such change.[6]

[5] Hammond v. Putnam, 110 Mass. 232.
[6] Perry on Trusts, § 449.

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Where property is to be held for the benefit of one or more in succession and is of such a nature that it grows less valuable, or where the course of use and the lapse of time will make the final estate of diminished value, a court would imply an intention that the original property should be sold to the best advantage and the proceeds invested in what are ranked as "safe investments" in the particular state. (Funds must not be invested outside of the state.) By doing this the beneficiaries have an equal return each year, and whoever takes the remainder or final estate receives it undiminished.

§ 417. The Law as to Making Investments of Trust Funds

There are certain general rules applicable to investments of trust funds made by trustees:

1. Any specific directions in the will or other instrument creating the trust, as to the investments to be made or retained, must be followed exactly as to time, manner, and kind of investment.

2. If there are no directions, the rules of court or any state laws or statutes on the subject would govern so far as they go, and where these do not exist or do not apply, the trustees are expected to use good faith and sound discretion.

An investment by a trustee should be first of all a permanent, safe investment, and the question of income comes second. In no case should the investment be speculative.

The usual rules of investment for trustees prescribe: (1) government or state securities, and (2) bonds and mortgages on unencumbered real estate.

In some states the statutes extend these limits.

Investments may not be made beyond the jurisdiction of the court having charge of the trust. If such investment is made, the trustee is responsible for any loss.

Trustees are never justified in loaning money on personal security unless the trust instrument expressly authorizes such

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risk. Any such loan would make the trustee personally liable for any resulting loss.

Unless by express directions, a trustee cannot employ the trust funds in any business or manufacture. If a trustee does this he is liable for any loss, and if there are profits he will be compelled to turn them all over to the *cestui que trust.* The same rule applies if trustees continue the business of the testator instead of closing it up with the least delay. When all the beneficiaries are capable of consent and all do consent to the continued conduct of a business, the trustee will not be required to make good losses.

> We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from the testator. The trusts of this will are to provide the testator's children with incomes during their lives and on their deaths the principal is to go to their issue. The very object of the creation of the trust, was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty. The range of so-called "legal securities" for the investment of trust funds is so narrow in this State that a testator may well be disposed to grant to his executor or trustees greater liberty in placing the funds of the estate. But such a discretion in the absence of words in the will giving greater authority should not be held to authorize investment of the fund in new, speculative, or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaskan gold mine, and the fact that a trustee

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is not limited to the one does not authorize him to invest in the other.[7]

In Massachusetts and some other states a certain latitude has prevailed, and trustees may buy the stocks of banks and manufacturing and insurance corporations.[8]

In mortgage loans, the loan should in no case be greater than two-thirds of the valuation, and in some cases the mortgage should not exceed 50 per cent of the valuation.

In each state the local law and usage should be ascertained and in case of doubt the court should direct.

§ 418. The Trustees' Control of the Property

In the usual trust the trustees are entitled to the possession of the property and the legal title is in the trustees. As the legal owners, they can sue and be sued. If the property were corporate stocks, the trustee would attend meetings, and vote, and could be elected a director of the company. He would pay all taxes.

It would be the duty of a trustee to hold both real and personal property in his name as trustee and all deeds, bonds, mortgages, stock certificates, and other evidences of value, should be kept as careful men of business keep their papers, in a secure safe, or in a safety deposit box.

If the trust involves the care of real estate, houses, stores, or farms, these should be cared for and looked after as careful business men look after such property of their own, in many cases by the selection of prudent and trustworthy agents or managers skilled in the particular line.

§ 419. Trustee's Duty to Make an Income

It is the duty of a trustee to make a safe income for the beneficiary. If he delays unreasonably to do this, he may be

[7] Matter of Hall, 164 N. Y. 199.
[8] Hunt Appellant, 141 Mass. 516.

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charged with interest. It is not clear how much dilatoriness will be tolerated. A year has been allowed and an executor must still be allowed that period. It is doubtful if a present-day court would in any case let a trustee be so slack. The supreme court made a trustee pay interest for all the time that the fund was idle in excess of three months. That period would probably be the usual rule as to principal. Accruals from rent, dividends, etc., could not be invested so readily and more time would be allowed.

Usually in cases of this kind, the trustee is charged simple interest at the legal rate, and more if he had used the fund for his own purpose and had made more. He is not to profit from his dealings with the trust fund.

In a few cases compound interest is charged. If a trustee were directed to accumulate income and failed to make the investment, he might be charged compound interest. It is rarely, however, that more than simple interest is charged.

Review Questions

1. What is the duty of a trustee? If he gives the trust property the same care and attention as he gives his own, will it be satisfactory? How should he care for funds?
2. May a trustee delegate his duties to another? When may he act through agents? What is his duty in this particular? What things must he decide himself?
3. What is the rule as to the trustee making a personal profit from the trust? In case a trustee did use his position for personal profit, what would be the penalty? If several trustees are concerned, what is the rule?
4. What is the first duty of trustees? What should be done when the trust property consists of claims against others? What should be done by an executor? What is a trustee's duty as to selling property?
5. Why must trust property be kept separate? If the trustee mingles trust property with his own, what is the effect?

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6. What should the creator of the trust positively specify? What is the rule as to converting real into personal property? What is done when the will is not clear? What powers has a court of equity? What should be done when trust property is depreciating?
7. What is the rule where specific directions are given? What is the rule when there are no directions? What are the usual rules for trustees' investments? What is the rule as to investments out of the state? As to personal loans? As to using funds in business? What effect has unanimous consent of beneficiaries to a violation of the rules?
8. In Massachusetts, what is the rule? In mortgage loans, what is the rule?
9. What right would a trustee have as to stocks? In whose name should property be held and business transacted? How should valuable instruments be kept? How should real estate be cared for?
10. What is the trustee's duty as to making income? If he is dilatory what is the penalty? When may compound interest be charged?

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CHAPTER XLVIII

RIGHTS OF BENEFICIARY

§ 420. Right to Information and Accounting

It should be understood by both trustee and beneficiary that all papers, records, and data, bearing on the trust, the trust property, and the income therefrom, are to be kept by the trustee, and that the beneficiary has the right at any reasonable time to inspect, look over, and take copies of any of these data. The beneficiary also has the right to have his attorney or his accountant examine, inspect, and make copies of them.

Further, "a trustee or an executor is bound to keep clear, distinct and accurate accounts. If he does not, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him." [1]

If the trustee enters such accounts in his private books, he will nevertheless have to produce these books; and the same holds good even if he has entered the accounts in the books of a firm of which he is a partner.

Much feeling arises at times in the settlement of estates and the administration of trusts, because the legatees or *cestuis que trust* do not understand the situation or the necessary limitations under which executors and trustees work, and it is worth taking some considerable trouble and pains to make the whole business intelligible to them and to make such reports and statements as are made, understandable by those most concerned. When the beneficiaries evidently misunderstand, they should be encouraged to get the aid of a professional

[1] Perry on Trusts, § 821.

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accountant or an attorney or some capable business friend, to look into the whole matter and see that it is all straight.

In all trust relations, the beneficiary may have an accounting ordered where there is any reason for suspicion or any failure to allow inspection or to make satisfactory reports and statement.

In all cases where there are trust relations, a court of equity will, wherever it seems advisable, order an accounting, going back as far as may be necessary to show all the dealings with the trust property. The only difficulty in such case is the expense and trouble incident to the procedure.

§ 421. Right to Restrain Injurious Action

The *cestui que trust* may have an injunction issued to restrain the trustee from proceeding with any unauthorized action, if such action will result in irremediable damage. A court of equity will, in a proper case, issue such restraining order as the particular situation demands. In a case requiring such action, stockholders may restrain directors from taking unlawful action.

§ 422. Right to Have Trustees Removed

A *cestui que trust* has the right to have the trust property managed by honest, capable trustees, and if a trustee is not capable, or refuses to act, or deals with the trust fund for his own benefit, or fails to pay over the income as directed, or becomes interested adversely to the beneficiary, or if there is any other good cause for change, a bill or petition for his removal and the appointment of another will be received and acted upon if the case against the trustee is proved. This is a regular court proceeding, and the offending trustee must be duly notified and have the opportunity to file an answer and to be heard in opposition, which means that a formal trial must be had. If there is danger that the trust property will

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not be properly handled pending the trial, the court will appoint a receiver.

It is to be noted that proceedings of this kind are not simple and should be undertaken only on advice and under the direction of capable and conscientious counsel.

§ 423. Right to Follow the Trust Fund

The *cestui que trust* can follow the trust property and have it subjected to the trust, unless it comes into the hands of an innocent holder for value. This is true also as to property substituted for the original property. As long as the fund can be traced, a court of equity will hold it for the benefit of the original *cestui que trust*. The right depends: (1) on the tracing of the trust property or money received for it, and (2) on the party in possession having a knowledge of the trust when he bought it. It is not a case that occurs often, and when it does occur, the aid of counsel will assuredly be required. (See § 416.)

§ 424. Remedy Against Trustee

If the trust property has been made away with and cannot be traced, or if when traced it is found to be in the hands of an innocent holder for value, the *cestui que trust* may then bring an action directly against the trustee. In any case he may do this, for the trustee is always responsible for the damage caused by any breach of trust. As courts of equity always have cognizance of all matters relating to trusts, such a suit would be brought in a court of equity, because the remedies are more effective than the simple judgment for damages given by a court of law. For instance, if the trustee had sold trust real estate to an innocent purchaser for value, a court of law could give judgment only for a sum of money, while a court of equity may: (1) compel the trustee to purchase other lands, or (2) allow the *cestui que trust* to take the proceeds

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of the sale with interest, or (3) give judgment simply for damages.

As a general rule, a trustee cannot protect himself, following a breach of trust, by showing that with diligence and due care a *cestui que trust* could have protected himself or prevented the loss or damage; but, in the case where the trustee has failed to bring suit when he should and the *cestui que trust* has already had the trustee removed because of this, and there is still time to start a suit, the trustee may use this as a partial defense against any later suit brought against him by the *cestui que trust*. The reason that such evidence is admissible is because it shows that any loss on the part of the *cestui que trust* was not entirely due to the trustee's negligence, but due in part to the carelessness of the *cestui que trust*.

Review Questions

1. What rights of inspection has the beneficiary? What is the duty of the trustee as to records? May a beneficiary have the aid of an accountant or attorney in examining accounts?
2. When may a beneficiary have an injunction issued?
3. For what causes may a trustee be removed? Is this a simple matter?
4. If the trustee makes away with trust property, what remedy has the *cestui que trust*? On what does the right to trace the property depend?
5. Is the trustee liable to action for making away with trust property? In what court? What remedy can be secured?

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CHAPTER XLIX

POWERS OF TRUSTEES

§ 425. Classification of Powers

Trustees have certain general powers by virtue of their offices. Every trustee has these general powers unless the instrument creating the trust in some way limits them. They are inherent in the office of trustee and may be limited by the declaration of trust.

If the instrument creating the trust gave other powers, these would be special powers. Special powers are either mandatory or discretionary. Mandatory powers are positive and must be carried into effective action. Discretionary powers are left to the judgment of the trustee as to whether or not they are to be exercised.

> The rights and powers of a trustee properly qualified and appointed are derived from and measured and limited by, the instrument creating the trust, and usually include not only general authority to possess, manage and preserve the trust property, and to execute this trust, by distributing the property and funds among the *cestui que trust*, but specific authority to sell, mortgage, lease and pledge the trust property and to invest the trust funds, as well as authority to institute and defend actions for the benefit of the trust and to incur reasonable expenses in administering and executing the trust.[1]

§ 426. General Powers

The general powers of all persons who are appointed trustees are as follows:

[1] 39 Cyc. 290.

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1. To take possession of and hold the trust property.
2. To invest trust funds so as to yield a fair income.
3. To sell and re-invest when it is necessary.
4. To sell and convey real estate when necessary to carry out the provisions of the trust.
5. To release real estate so that it may earn income.
6. To repair and pay taxes on trust property.
7. To sue or defend suits when necessary.
8. To contract so far as may be necessary to carry out the purposes of the trust.
9. To pay over and distribute the trust property to those entitled to it.

The enumerated powers include all incidental powers necessary effectively to exercise the powers named. For instance, to take possession may require suit to be brought, counsel to be employed, and, possibly, compromises to be agreed to. If property is leased, the income must be collected and applied.

In all cases of doubt as to what the law is, and what the conduct of trustees ought to be under it, they are entitled to instruction and direction from the court.[2]

§ 427. Mandatory Powers

Powers are mandatory or imperative when they must be exercised positively within a reasonable time or at a given time or when some contingency happens.

Imperative powers may be:

1. To sell real estate or other property.
2. To pay over income.
3. To pay over principal.
4. To transfer property.
5. To distribute property.

[2] Perry on Trusts, § 476.

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The contingencies on which action is to be taken may be generally as follows:

1. To sell real estate or other property when some person or persons die or come of age or marry.
2. To pay over income or principal if a certain person marries in a specified manner.
3. To pay over principal when or as minors come of age.
4. To make certain payments if sickness or accidents or misfortunes come to certain beneficiaries.

§ 428. Discretionary Powers

If it is intended that any of the powers granted are to be discretionary, the intention must be shown by using words such as "in their discretion," "if in their judgment it seem best," "if said trustees shall approve," or "in such proportions as said trustees shall deem best." There are several cases where trustees exercise discretion, as follows:

1. The discretionary powers may extend to giving or withholding the gift, legacy, or other interest. In such case it should be provided that the interest, if withheld, shall be bestowed elsewhere.

2. The discretion may be as to selecting from, or portioning among, a class. An example of this would be a bequest of a library "to be kept until all my nephews are of age and then given by said trustees to the one who in their judgment would most appreciate and make the best use of the same."

3. The discretion may be as to the sale or lease of real estate or securities. The following language would express this act of discretion: "Said trustees may in their discretion sell or lease any of said real estate, when in their judgment such action is expedient, and in event of such sale may re-invest the proceeds in first mortgages, or approved corporate and railroad securities." Such a discretion will be subject to the con-

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trol of the court more closely than other classes of discretionary trusts.

4. The approval or consent of the trustees may be required to a marriage or the selection of a vocation or a plan of education. For example: "If any of my nephews or nieces should on reaching the age of eighteen desire to undertake any reasonable course of education or training, professional or otherwise, likely in the judgment of said trustees to fit them to lead useful lives, said trustees may pay their reasonable bills for tuition and board, for a period of four years, but such payments may be stopped at any time if in the judgment of said trustees the beneficiaries are not making good use of their opportunities."

In such cases the judgment of the trustees cannot be controlled by the court. If, though, they paid out money wastefully and to parties who were not entitled to consideration, the court would restrain them on application of some party in interest. The court would also intervene to prevent any action clearly beyond the discretionary powers granted.

A personal discretion does not, unless expressly authorized, pass to a delegated or substituted trustee.

§ 429. Power to Forbid Marriage

It is sometimes provided that a property is to be given to a *cestui que trust* upon marriage with the approval and consent of the trustee. In order to make such a restriction effective, there should be a gift over in event of the marriage taking place without such consent or approval. If the possible beneficiary marry without the consent of the trustee, he or she cannot claim the gift.

Most of the cases in which this power has been judicially considered are English cases, and it is not certain that American courts would follow them.

An American court of equity would certainly require a

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trustee in any such case to exercise his power with the utmost good faith, and would relieve the *cestui que trust* if the trustee were arbitrary, unreasonable, or harsh.[8]

§ 430. Court's Control of Discretionary Powers

A court may interfere with the exercise of discretionary powers in the following cases:

1. Where the trustee failed to exercise discretion.
2. Where discretion was unfairly exercised.
3. Where discretion was not used in good faith to promote the end and purpose of the trust.
4. Where the trustee or his family benefited or gained by exercise of discretion.

Generally, courts will not interfere to compel a trustee to exercise a purely discretionary power. It is to be assumed that the creator of the discretionary trust intended the trustee and not a court, to judge what should be done. Nevertheless, if for any selfish, fraudulent, or improper purpose, the trustee refuses to act, the courts will give a remedy to the parties injured.

If he exercises his power in an unfair, dishonest, or capricious manner, the courts will give relief. It is necessarily impossible to be definite on this subject, and much would depend on the circumstances of the particular case.

Courts will not, without strong reason, disturb a discretionary power, but if a trustee who was to apportion or give certain funds or property to one or more of a family of children, should die or refuse to select, the court would divide the property equally among all the possible beneficiaries.

In any case where a trustee exercises a discretionary power to profit himself or his family, the courts would interfere to prevent or correct the wrong.

[8] Perry on Trusts, § 519.

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If discretionary powers are exercised in good faith, the court will not interfere. The courts will intervene only when the trustees act capriciously or dishonestly. The courts will not substitute their discretion for the discretion of the trustees unless it appears that the trustees have abused, or are likely to abuse, their discretion. If a trustee refuses to consent to a sale or a marriage, from arbitrary or interested motives, the courts may be asked to compel him to assent.

§ 431. How Powers Are to Be Exercised

All powers must be exercised by trustees in good faith and with the care and diligence which an ordinarily prudent man would use in the management of his own affairs. His general powers may be limited by the instrument creating the trust, and if he has any special powers, they are expressed in the instrument. The intent of the testator or creator of the trust is to be gathered from the instrument, and named powers carry with them all incidental powers necessary to make the main objects effective. A trustee has power to take possession of the property and to collect all claims. To do this he has the right to bring suit, to employ counsel, and to compromise if compromise is advisable. A trustee has power to care for and manage the trust property. This includes power to lease if advisable, power to pay taxes, and to make needed repairs. In a necessary case he would have power to mortgage. If there are funds to invest, the trustee must buy such securities as the will or declaration of trust authorizes or such as are allowed by the state law or the orders of the court. If any securities held depreciate, he must sell and reinvest. If a trustee made a sale without good reason and loss resulted, he would be held responsible.

If a will directed the conduct of a business for a certain time, the trustee would have authority to make all contracts necessary to the conduct of the business.

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Review Questions

1. Distinguish between general and special powers of trustees. Distinguish between mandatory and discretionary powers.
2. What are the general powers of all trustees? How may any of these powers be limited?
3. What are the usual mandatory powers? What are the usual contingencies on which imperative action is to be taken?
4. What are the usual phrases indicating discretionary powers? If discretion as to making a gift were exercised adversely, where would the gift go? What exercise of discretion do the courts supervise most closely? In what cases has the court no control?
5. If the consent of a trustee were required to a marriage, how could it be made effective?
6. Where may a court interfere with the exercise of a trustee's discretion?
7. How should a trustee exercise his powers? What incidental powers would a trustee have?

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CHAPTER L

A TRUSTEE'S LIABILITIES

§ 432. General Liability of Trustees

A trustee is liable to the *cestui que trust* for any damage arising from the trustee's bad faith or negligence. These may be summarized as follows:

1. Liability for damage from positive bad faith:
   - (a) Embezzlement
   - (b) Mingling trust funds with his own funds
   - (c) Investing in unsafe securities
   - (d) Investing trust funds in his own business
   - (e) Refusing to pay over trust funds to those entitled to them
2. Liability for negligence:
   - (a) Leaving funds idle
   - (b) Failing to change investments when they become unsafe
   - (c) Not keeping trust property safe

A trustee is held to the usual practice of a careful, prudent business man. When he comes short of this, by reason either of bad faith or of carelessness, he becomes liable for any resulting loss or damage.

If he leaves the funds idle, he may be made to pay the interest or income that otherwise might have been earned. (See § 411.)

§ 433. Breach of Trust

A breach of trust is any act or omission of a trustee that violates his duty to care for the trust funds or to pay over the

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income or the principal to the beneficiaries. It is used loosely to designate anything from arrant knavery and theft to lack of care in selling securities that were depreciating.

If a trustee embezzles the trust funds, it is a breach of trust and is also a criminal offense. If he leaves the trust funds to a partnership of which he is a member, it is a breach of trust and he is liable for any damage, but it is not a criminal offense. If a trustee having discretion as to payments refuses, without adequate reason, to make payments at all, it is a breach of trust. If he does not make sure that his co-trustee deposits receipts and loss ensues, it is a breach. A trustee is liable to the beneficiary for all loss resulting from the trustee's breach of trust.

§ 434. Making Bad Investments

It is the duty of trustees to invest trust funds according to the directions of the trust instrument, if there is any, or to the statutes or rules or orders of court, or, failing these, they must invest in good faith and with sound discretion. When trustees depart from these general rules and loss ensues, they are liable to make the losses good. (See § 435.)

There are a good many rules as to investments a trustee should not make:

1. He should not invest funds beyond the jurisdiction of the court.

2. He must not invest in personal securities.

3. He must not invest in trade, business, manufactories, or any speculative enterprises.

4. He must not invest in new and experimental enterprises.

5. He must not loan money on second mortgages.

6. He should not invest in first mortgages in excess of 50 to 60 per cent of the value of the property.

7. He should diversify his investments and not put too much into any one security.

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8. He should change investments only to guard against depreciation, or to change unprofitable securities into profitable ones or unlawful enterprises into those legally proper.

Generally, trustees must exercise the care and prudence of a reasonable man. They must investigate as to the safety of investments and must thereafter watch, and, if any investments become unsafe, must sell them forthwith.

§ 435. Negligence in Investing Funds

A trustee is liable not only for positive mismanagement, such as investments in speculative securities or in some ordinary business, or for a breach of trust, as where he lends trust funds to a friend or uses them in his own business, but he is also liable when loss occurs on account of his failure to use the prudence that a careful business man would use in handling his own funds.

If a trustee is negligent and fails to invest the principal, or if a fund is to accumulate and he fails to collect the income when due or to invest the income as soon as it is sufficient in amount, he is liable to the *cestui que trust* for the loss of interest or income caused by his negligence.

Executors have been allowed to leave funds in a bank for a year after the death of the testator, but this is not a general rule. They should proceed with reasonable diligence in each case. Three months has been held a reasonable time.

Trustees and guardians are held more strictly to account for interest than executors, for it is supposed that they take funds ready for investment and do not have to collect them as a preliminary.

The consequence of mismanagement or failure to exercise due care is a liability for all resulting loss or damage. If the trustee has given bond, he and his sureties are both liable, and his surety will have a claim against the trustee for whatever amount the surety has to pay.

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The liability in case of negligence is only for the amount of interest lost by reason of the delay in making the investments.

§ 436. Theft or Robbery

A trustee is not responsible for thefts or robbery by a stranger if he has taken all the precautions that a careful business man takes in guarding his own property. Neither is he held responsible for thefts and embezzlements by agents, brokers, or attorneys, where he is justified in acting through others and in placing the funds in their hands and has exercised proper care in their selection. In case the trustee puts the funds into the hands of others when it is not necessary, he is responsible if anything is lost by theft or robbery.

In any case under this head the liability would be for the entire amount lost.

§ 437. Accident

A trustee is not responsible for a loss by accident if he is acting strictly in the line of his duty. The loss will be that of the beneficiary. If, however, he has departed from the rules laid down for trustees in caring for trust property, and some accident or disaster occurs and the property is injured or destroyed, he will have to make it good.

If it were a case where the property should have been insured and the trustee had neglected to insure, he would be liable.

§ 438. Fault of Co-trustee

The general rule is that a trustee is not liable for losses caused by the default or negligence of a co-trustee, unless he has co-operated with the trustee who is at fault, or has known of his misconduct and has not taken any steps to prevent. If the matter was one in which each trustee should

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have interested himself, no one would be guiltless even though he did nothing himself. A trustee is not a surety, however, for his co-trustee, and in any case the question of liability will depend on all the circumstances. If one trustee were to take charge of the funds for investment, it would be the duty of his co-trustee to see that the proper investment was made.

In all these cases the question is: Has the trustee employed such prudence and diligence in the discharge of his duties as, in general, men of average prudence and discretion would, under like circumstances, employ in their own affairs?

Where several trustees are concerned in the management of a trust, it is usual to apportion the duties, and in such case, where there is nothing to cause suspicion there is no liability for one another's defaults. Where the trust funds are in the hands of one trustee for a proper business purpose, the others are not responsible for his misconduct. This would not hold if the funds were held by the defaulting trustee longer than the circumstances justified, or if the defaulting trustee were of bad character and credit, or if the matters were not looked after by the other trustees and the facts ascertained. In such cases or in any case where the trustee who committed a breach of trust was enabled to do so by the negligence, ignorance, or acquiescence of a fellow trustee, both would be liable to the beneficiary.

Executors can act separately in regard to the trust property, but trustees should all act together. If co-trustees cannot agree on any necessary action, they must apply to the court for instructions. For instance, if suit were brought affecting the trust property it would be necessary for all the trustees to employ the same counsel in order that they might defend together. If they did not do this and extra cost resulted, they might be compelled to pay personally. All trustees must join in transferring securities, conveying or mort-

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gaging real estate, or pledging the trust property. A bank deposit should be in the name of all the trustees, and when for convenience one is permitted to check out on his sole signature, all will be liable for any resulting loss.

§ 439. Mingling Trust Funds

When a trustee mixes trust property with his own, the beneficiary may take the whole, leaving the trustee to prove his own part. A court of equity will try to trace a trust fund and, if it can be followed, it will be held to the purposes of the trust unless the rights of innocent third parties are affected. As between the *cestui que trust* and the trustee, and all persons claiming under the trustee (otherwise than by purchase for a valuable consideration without notice), all property belonging to a trust, however it may be changed or altered in its character, and all the fruits of such property, whether in its original or altered state, continue to be subject to and affected by the trust.

Interest will be charged against a trustee who has mingled trust funds with his own, and annual rests may be taken and the interest accumulated added to the principal.

Where the trustee mixes the trust fund in his own bank account, if he is insolvent the *cestui que trust* will have to take his chance with all other creditors. If the trustee is not insolvent, the *cestui que trust* may take whatever has not been withdrawn. Practically, it is not easy to track trust funds, and when the trustee is insolvent and has used the trust funds with his own, they cannot usually be identified and the *cestui que trust* fares no better than any other creditor. Where it can be shown that the trust funds have been used to buy certain definite property or securities, these can be held as affected by the trust, and creditors have no claim upon them.

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Review Questions

1. For what is a trustee liable? What things are bad faith? What things constitute negligence?
2. What is understood by breach of trust? Give an example.
3. What is the first authority on a trustee's investments? The second? What are some of the negative rules?
4. Is the trustee liable if he leaves money at low interest in a savings bank?
5. What would be the liability for failure to make any investment?
6. When is a trustee not liable for theft or robbery?
7. Is a trustee liable for loss by accident? If he should have carried insurance and did not, would he be liable?
8. When is a trustee liable for the fault of his co-trustee? What is the test question in all cases? How can executors act? How should trustees act? How should bank deposits be made?
9. What is the situation when a trustee mixes trust property with his own? To what extent can trust funds be followed?

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CHAPTER LI

TRUSTEES FOR MARRIED WOMEN

§ 440. The Common Law and Married Women's Rights

The common law had no care for the rights of married women; or, rather, under the common law a married woman had no rights worth consideration. When a woman married, her husband was at once entitled to all rents, income, and profit from her real estate. All her personal property was his absolutely, to dispose of at his pleasure. Any part of his wife's property that was in the shape of a right of action could be sued on by the husband, and whatever he recovered was his. If he was insolvent, his creditors could take his wife's personal property the day of the marriage and bring suit on her rights of action and apply all the property recovered on his old debts.

At common law, a husband became entitled to receive the rents and profits of his wife's real estate during their joint lives, and he became entitled to all her personal property in possession, and to all her choses in action if he reduced them to possession during his life. If he did not reduce them to possession, and survived her, he was entitled to be her administrator, and he thus took all her choses in action. He also was entitled to all her chattels real, and had full power to sell and convey them. But if the husband died without having aliened her chattels real, or without having reduced her choses in action to possession, she, as survivor, continued to hold them as if she had never been married. The principle was this: by the marriage the husband became bound to pay all debts due from the wife before marriage; he also became bound to support and maintain the wife and her children in a proper manner. In consideration of these obli-

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gations, and to enable him to perform these duties, the law gave him the property of the wife as stated.[1]

It is gratifying to know that there was a "principle" in the matter and that it was not merely because the male of the species was the lawmaker.

§ 441. The Common Law and Trust Estates

If a married woman were the *cestui que trust* of a trust estate, or if a woman who was the *cestui que trust* contracted marriage, the common law gave her husband the right to take whatever the trustee would have had to pay her. That is, under the common law a husband had the same right to his wife's equitable estate that he had to her legal estate, and her rights were as completely abrogated in the one case as in the other. The whole proceeding was so repugnant to every sense of fairness and justice that the courts of equity tried to find some way to evade it. The simplest way would have been to change it by positive legislation—an act of Parliament—giving a married woman the same control over her property that a married man had, but to do this would have been openly to admit that the common law was wrong and that the fathers had been unjust and inequitable for many years, which Englishmen—and other men as well—are always loath to do. Therefore, relief had to come first indirectly, through courts of equity.

§ 442. Marriage Settlements

The doctrine of marriage settlements was an invention of the English courts of equity to mitigate the injustice of the common law in its dealings with the property of married women. When the wife was the *cestui que trust* and the trustee declined to pay over to the husband what the wife was entitled to, the husband had to come into a court of equity to compel the trustee to pay him his wife's money. In such

[1] Perry on Trusts, § 625.

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a case the court on the maxim that "He who seeks equity must do equity," would order that a proper settlement should be made the wife, from her own equitable property, before any part was paid to the husband. It was said that a wife and her children had an equitable right to a settlement; that is, the courts of equity said so, and whenever the question came under their jurisdiction they enforced the doctrine.

A settlement is a provision made for a wife and her children, that cannot be taken by either her husband or his creditors.

In connection with this doctrine of settlement, much curious equitable law developed. A husband could make a settlement on the wife himself, and when the parties to the marriage were of influential families, this matter of settlement was always carefully handled by the bride's family. Equity recognized and enforced these antenuptial contracts if a reasonable provision was made for the wife in lieu of what she gave up.

It was only one step further to decide that anyone who had property had the right to give and settle it on a married woman to her sole and separate use, free from the interference and control of her husband. This made it possible for any relative or friend to provide an independent property or income secure to a married woman, and safe from her husband and his creditors.

§ 443. Creating a Wife's Separate Estate

A marriage settlement of this kind may be made without any express trustee, or if it is necessary to have a nominal trustee, the husband shall be held to take the legal trustee's title, and may be compelled to act in that capacity.

A marriage settlement is peculiar in this respect, that restraint on alienation and against anticipation of income will be sanctioned by courts of equity.

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No special form is necessary to create such a married woman's trust, but the intention to exclude the husband from control or benefit must be clear and beyond doubt. "For her sole and separate use" is sufficient in any case to bar the husband's right.

If property is conveyed to a single woman "for her sole and separate use," she will have the same control of it as any other owner until she marries, when the limitation will take place, and she cannot sell it while she is married nor can it be taken for her debts.

Apart from this, a married woman may deal with her separate property as if she were single. If personal property is given to the separate use of a married woman, she may sell or otherwise dispose of it. This is probably now the rule in all the states. If the instrument of settlement prescribes any limitations on her power of dealing with the property, she can deal in no other way.

§ 444. The Modern View

Most of what has been written in this chapter is now practically obsolete law. The statutes of nearly, if not all, of the states now provide that any property, real or personal, owned by a woman at marriage or which shall come to her after marriage by gift, bequest, or devise, or which she may acquire by her own services or abilities, shall be her own separate property, which she can own, control, and deal with, as her husband deals with his own property or earnings.

The passage of these acts does not interfere with any other settlement made before the passage of the acts. It would also be possible to arrange a settlement on the old plan if it were desired by a married woman. In some states there are statutory provisions that allow the appointment of trustees to hold a married woman's separate property if she so desires. Practically, though, the statutes have done away with

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the old method of making settlements on married women, and laws relating to it are for the most part already obsolete.

If at the present time it is expedient to create a trust estate for a married woman or to provide a regular income for a single woman who may marry, such a trust is created as it would be constructed for any individual, and the duties of the trustee under such a trust would be neither more nor less than for any other *cestui que trust.*

Review Questions

1. What rights did a married woman have at common law?
2. At common law, could a husband take possession of her benefits from a trust estate?
3. How did the courts of equity try to remedy the situation? At this period, if a trustee voluntarily paid the trust income to the husband, could it be helped? What is a settlement? What was the next step in making the situation better?
4. Did a marriage settlement require a named trustee? What was its essential feature?
5. In this country, what is the usual law at this time? How are trusts usually created for married women?

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CHAPTER LII

GUARDIANS FOR INFANTS

§ 445. Orphans' Courts

When property belonging to an infant needs the care and custody of someone of more mature years, the court, which in this country is that one which has special charge of both the person and the property of minors and is called variously the "court of probate," the "surrogate's court" and the "orphans' court," will appoint a guardian of the infant's property, who is a trustee in the strictest sense of the term. The place of residence of the minor determines what court has jurisdiction to appoint a guardian. The peculiar function of such courts is the care of orphans and minors whose natural guardians cannot or do not provide for them. It is unlawful for any person not authorized by such a court to interfere with the person or the property of such a minor. Where a guardian is appointed by will, the appointment must be approved by the court before the guardian can act. Where property is placed in trust for the benefit of a minor, any abuse of authority or negligence in execution by the trustee can be corrected by the court, or the trustee may be removed and another appointed to fill the vacancy.

The court can enforce its authority and directions by contempt proceedings against the offending party.

§ 446. Maintenance and Education

In the case of orphans it is the duty of the guardian to see that they are cared for and educated, and the court will always direct the proper expenditure for this purpose. In fact, where there is need for the support of children whose father is dead,

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the guardian might safely apply the income this way and trust to the court's approval later. If the father is alive, it is his duty to care for his children, and while the income of property belonging to the children could be used in case of his inability to support them, that inability would have to be proved, otherwise the father would be the beneficiary and not the children. If the property belonging to the children is considerable and the father could not of his own means give them the education and training they should have properly to fill the position they would probably occupy, the court would direct an allowance to help the father.

A mother will nearly always be allowed maintenance for her children out of the income of any property they may have. The amount would be fixed by the court.

There are cases where property is left for the maintenance and education of the children with the intention of helping the father give the children a better education and training than he can afford. In such cases the instrument should expressly state that such is the intention.

The trustee is accountable for the proper application of money allowed for maintenance and education. If the father misapplies money paid to him, the guardian must exercise his discretion and make some other arrangement. It is his duty as guardian to see that the income is properly applied and is not wasted or misapplied.

§ 447. Using the Principal

Where it is possible, only the income of a minor's property should be used for his maintenance and education. Where this is not possible, the court will allow a trustee to trench upon the principal. In no case should a trustee do this without permission of the court. The court alone has power and will exercise it when it is strictly necessary.

A court would more willingly direct the expenditure of

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principal for education and training for some business or profession, than merely for maintenance. To expend principal in preparation for life is considered by the courts as being really a form of investment and as merely changing the capital into another and probably more desirable shape.

If several children were interested in the fund or if the principal were to go to someone else after the minor had had the use of the income, it might render it impossible for the court to make such an order. In no case should a trustee act without authority from the court in charge.

§ 448. Investments of Principal

All the general rules as to the investment of trust funds to insure their safety, hold good in regard to a guardian's investments. The object is always safety first, and speculative and private business enterprises are barred. In those states where the laws prescribe certain investments for savings banks, the courts often direct guardians to invest in similar securities. If the trust were created by deed or will, any specific directions as to investments would control.

A guardian would not be justified in making investments that would change personalty into real estate, or vice versa. No sale of real estate would be legal without court authority. No title could be given by an unauthorized sale. In most of the states the laws prescribe the procedure to secure an order for sale of a minor's real estate, and in such cases the statutes must be followed. Cases arise at times where it is necessary that property of minors should be sold, and then recourse must be had to the court having jurisdiction.

§ 449. Payments by Guardian

The guardian is under bond for the faithful discharge of his duty. A guardian duly appointed is authorized to collect moneys due and to take possession of all property belonging

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to the minor. His receipt is a sufficient discharge to those paying him money or turning over property to him. In reducing the minor's estate to possession, he has the usual authority of any trustee.

It is in paying out what he has received, that the guardian must exercise his discretion. If money is to be paid to a minor, the guardian cannot safely pay it to the minor nor to anyone for him, unless he is authorized so to do by the court. If he does so, he may be compelled to pay the amount again when the infant comes of age. A receipt from a minor is of no legal effect.

In any case where the will or other instrument creating the trust directs the method of payment, the trustee may safely follow orders.

In some cases, where the amounts coming to children are small, courts of probate simply direct that they be paid direct to those having the care of the children in order to save the formality and expense of appointing a guardian of the property.[1]

Where a ward lives with his guardian as a member of his family, there is usually no obligation for board, and on the part of the ward, no claim for any services rendered. In some states, under such circumstances it is held that the guardian has a claim for maintenance.

Review Questions

1. When does a minor require a guardian? What court appoints? If a guardian were named in a will, would the court have authority? Why is a guardian bonded?
2. If the father were dead, what duty would devolve on the guardian? If the father were living, should the guardian of the child's property pay for support of the child? If the father could not

[1] Perry on Trusts, § 624.

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give the children proper education, what could be done? If it is intended that property should be used to help a parent bring up children, how should it be arranged? What responsibility has the trustee in regard to expenditures for maintenance and education?

3. When should the principal of a minor's property be used for his maintenance and training? Has a guardian or trustee authority to do this? What is the attitude of courts in this matter? Would it affect the action of the court if several children were interested or if the principal was to go elsewhere?
4. What are the rules as to investments by guardians? Can a guardian change real estate into personalty? Can a guardian sell real estate of his ward at his discretion?
5. What is a guardian's first duty? What caution must he observe in paying out money? What may courts do when amounts involved are small? Where a ward lives with the family of his guardian, is the guardian entitled to charge board? Must he pay his ward for any services rendered?

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CHAPTER LIII

TRUSTEES FOR INSTITUTIONS

§ 450. Management of Corporate Bodies

Any business enterprise in the corporate form is managed by a board of directors, who exercise the functions of trustees and in some cases are called "trustees."

Apart from these organizations established and managed primarily for profit, are a vast multitude of institutions and associations peculiar to our modern social organization, usually in some corporate form, in connection with which great properties are handled, immense funds are controlled, and vast sums expended. In all of these institutions boards of trustees have charge of affairs and direct the expenditures of income.

Some of these organizations are public, as are the educational, charitable, penal, and, in some cases, financial institutions controlled by the state and municipal governments.

Others are private and include:

1. The many universities, colleges, schools, and institutions of learning and training, and the great foundations, such as those that bear the names of Russell Sage, Carnegie, and Rockefeller.
2. The great multitude of charitable and philanthropic institutions, founded by private means and controlled by independent boards, such as hospitals, homes, and asylums for the orphaned, the crippled, the aged, and the unfortunate.
3. The many clubs, societies, and associations for all manner of social purposes, in all of which property

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is held and money is collected and expended by trustees, directors, or managers.

In all of these institutions those who control the property and manage the affairs exercise fiduciary functions, and are held to the duties and responsibilities of trustees.

§ 451. Management by Boards of Trustees

The management and control of corporate property and affairs rests entirely with the board of directors. This same rule extends to all sorts of associate bodies where those making up the membership are too numerous to act collectively. "Charities," taking the term in its broad sense, are managed in this way. Most public institutions are similarly handled. Libraries, lodges, churches, and associations of many kinds, have boards of trustees who manage and govern them.

Such boards can act only in regular or special meetings, notice of which has been duly given, and their action is expressed by actions and resolutions, adopted and recorded according to the usages of parliamentary law. Strictly, it is only in such lawful meetings with a quorum present that a board may act, and even the separate written assent of each member would not bind the corporation or other body represented by the board.

In corporations and in many other organizations, the board is elected annually by the stockholders or members of the organization. In stock corporations the vote is based on the number of shares held. In membership organizations each member has one vote. In public institutions and in many charitable organizations the trustees are appointed by some outside authority. In some charitable organizations, a vacancy is filled by vote of the remaining trustees. This makes what is called a "self-perpetuating" board, and may result in control by a clique of interested individuals.

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§ 452. Powers of Members of Board

Usually members of such boards may resign at any time. A peremptory resignation, phrased "I hereby resign," ends the office immediately. A tentative resignation, phrased "I hereby tender my resignation," requires acceptance before it takes effect.

Directors or trustees have no power to suspend or remove a fellow member. It is difficult to remove a director unless some special law gives authority for his removal. The courts will, for sufficient cause, remove a trustee of a charity or public institution. In some states the statutes provide some method of removing trustees or directors who abuse their trust.

In a corporation the directors have full authority to do everything necessary to conduct the corporate business, save as limited by statute, charter, or by-laws. These powers, however, extend only to the purposes for which the corporation was formed. A board of directors could not sell the entire assets, dissolve the corporation, or make a radical change in the business. A director is practically a trustee for the stockholders and must exercise a trustee's care and good faith and may have no interest adverse to the interest of the corporation.[1]

Trustees of institutions, societies, and organizations of all kinds, are expected to give the care, attention, and diligence that prudent business men give to their own affairs. The characteristics of these various forms of trusteeships will be discussed briefly in the following sections.

§ 453. Trustees of Charities

A charitable trust is held to include trusts for philanthropic purposes and also trusts for educational and religious objects and all trusts for public convenience, use, or benefit. Under this head would come trustees for colleges and universities,

[1] Cook on Corporations, § 648.

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churches, missionary societies, organizations such as the Y. M. C. A., the Red Cross, the W. C. T. U., the Child Welfare Association, and many others, including the great charitable foundations established by Carnegie, Rockefeller, and Mrs. Sage.

An indefinite or uncertain trust, or a trust without a beneficiary, if for a public or a charitable purpose will be sustained by the courts in most states, and will not be invalid because no trustee or beneficiary has been named. The same is true if there has been some error in defining who shall be the trustee or beneficiary, and it is possible from the context of the instrument or from certain incidents, to reach any conclusion as to whom the creator of the trust had in mind. As a rule, courts of equity will not allow a charitable gift to fail because there is no trustee, but will appoint a trustee to administer it or will do so themselves. The court will also take action of some sort where a trustee named by the creator of the trust is not in existence at the time the trust is effective, or where the trustee is unable or incapable of taking such office, or dies, is removed, or refuses to fill the office.

§ 454. Duration of a Charitable Trust

A trust of this nature is not within the rule applying to perpetuities, that is, with proper provisions it may continue for a period longer than "a life or lives in being and twenty-one years." As shown by the definition given, it is further distinguished from an ordinary trust by the fact that there is no specific beneficiary or beneficiaries named. A trust of this kind is called a "public trust," while the usual or ordinary trust is known as a "private trust."

§ 455. Trustees of Charitable Trusts

The person creating the trust may not only appoint the trustee he desires to carry out his trust, but may also set out

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the method or manner in which their successors are to be chosen. When this is done, the method must be followed whenever it is at all possible. When this right has not been reserved, it is for the court to appoint the new trustees.

When a trust is created, and the trustee appointed resides in a foreign jurisdiction or country, in case of his death, disability, or refusal to act, the court will assume that the foreign court having jurisdiction of the trustee will appoint a trustee to fill the vacancy.

Where an unincorporated club or association is appointed trustee, the trust will fail because there is no one capable of taking the legal title, and if the court wishes to see the trust carried out, it will have to appoint a trustee itself. Any trustee so appointed by the court, however, must not be one opposed in interest to the beneficiaries of the trust.

Trustees of charitable trusts will be held to the usual duties and will be subject to the usual liabilities of trustees. They will be subject to any limitations or directions set forth in the will or other instrument creating the trust. Apart from this they will probably frame their own rules as to meetings and procedure. These will be supplemented by the usual parliamentary procedure applicable to all action by associated individuals.

§ 456. Trustees for Public Institutions

In every state and in every city there are many public institutions—libraries, hospitals, asylums, schools, and other social activities—the properties and businesses of which are managed and controlled by boards of trustees or managers with the functions of trustees. In such institutions the duties of trustees relate more to the conduct of the institution and the careful expending of its income than to the care of investments and the handling of trust property.

Such trustees are usually appointed, and they should be

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men of character and standing in the community. Those most affected by any negligence on the part of these trustees are not usually in a position to complain or to institute any attempt to remedy any wrongs. If the negligence is very excessive, some newspapers may stir up an investigation, otherwise nothing is usually done. A board of trustees of a public institution is apt to be much wedded to routine, and the superintendents and managers who do the actual work usually give reports of the work that are assumed to be correct, and the trustees generally take only such action as is indicated to them.

In some states savings banks are not organized for private profit, and boards of trustees are appointed to manage solely in the interest of the depositors. In such cases they are held to the strict liability of bank directors and are answerable for neglect and lack of business prudence.

§ 457. Educational Institutions

In charitable gifts to educational institutions, the gift is valid even though expressing no specific territorial limit; or the gift may be confined to a certain class or condition of persons, as for example, a gift for educational purposes limited to "Quaker children."

Where the territorial limit to be benefited is stated, but is not absolutely correct or exact as to boundaries, as where a gift is made to a "town" or a "vicinity," if the true meaning of the creator of the trust is apparent, the trust will be carried into effect according to the intention.

The trustees of educational institutions should be men of character, intellect, and culture. Their most important duty will be the selection of the educational head. After that their duty will be to help him carry his policy into effect. Of late years, boards of trustees have in some cases assumed the right to exercise a certain censorship over the teaching staff, and, it is charged, have brought unfair pressure against the expres-

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sion of opinions on the part of the professors. In some cases the duties of trustees are obscure, as where a man founded a college or endowed a chair to teach something in theology or economics in which he believed profoundly but which has since been discarded by the world of thought. It is then a question whether the trustees shall see that nothing is taught that the founder would have disliked, or whether they shall assume that if he were living he would prefer a more modern and more liberal interpretation of the old doctrines.

§ 458. Unincorporated Associations

A charitable gift to a trustee or trustees for an unincorporated society or club is perfectly valid, even though, as stated above, such an association cannot itself be a trustee. Such a gift will be valid even where the trustee or trustees appointed are the officers or trustees of the society or club which is to be benefited by the creation of the trust.

Review Questions

1. What organizations and institutions are managed by boards of trustees or directors? What responsibility do these officers assume?
2. How are directors chosen in corporations? Who may vote at corporate elections?
3. How must such boards act? Can directors be removed? What is the usual authority of a board? What is the relation of the director of a corporation to the stockholders?
4. What are included under the term "charitable trust"? In your state, if a testator is indefinite or uncertain as to who is to be the beneficiary or the trustee, what will the courts do?
5. Does the rule against perpetuities apply to property left to a charitable trust?
6. May an unincorporated association act as trustee? What rules govern trustees of charitable trusts?

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7. How are libraries, hospitals, and asylums managed? What are the duties of such governing boards? How are savings banks managed in your state?
8. What are the duties of trustees of educational institutions? What kind of men should they be?
9. May an unincorporated association in your state take a bequest of personalty or a devise of land? May a trustee be named in a will to take a devise for it? Who manages the affairs of an unincorporated association?

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CHAPTER LIV

COMPENSATION OF TRUSTEE

§ 459. No Compensation to Trustee

In Great Britain, whence we derived our law of trusts, it is not usual to allow any trustee compensation. Over there, they have a legal maxim to the effect that a trustee may "make no profit out of his office." We have followed this rule so far as trustees and directors for charitable, educational, and public purposes, are concerned. It is not unreasonable to expect that capable men can be found who will give the time and care needed to manage the property and affairs of those institutions that exist not for profit but for the public good or to help the unfortunate.

It should be said that there are few capable business men in this country who do not give gratuitously time and ability to one or more institutions that yield them no profit or return. The rule that a trustee should "make no profit out of his office" properly applies to these, but in this country it is held not to apply to executives, guardians, and other trustees who handle private trusts, and are deemed entitled to compensation.

Trustees may have no compensation for their time and trouble, even when directed by a testator to carry on a business, unless the testator has made provision for such case in his will and has directed compensation. But, under a constructive trust, one who carries on another's business and is required to account for all profits, will be allowed compensation for necessary time or trouble expended by such a trustee in attending to the business.

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§ 460. Reimbursement of Expenses

Both in England and in this country, a trustee is entitled to be repaid expenditures reasonably and properly incurred in the care of the trust property. It is necessary that the expenses should be within the limits of the trustee's authority, and a trustee should not incur any expenses beyond his authority, unless they are authorized by the court or agreed to by the *cestui que trust,* who in such case must be of age.

A trustee should keep accurate accounts if he expects to be repaid. The courts will not allow lump or estimated expenses. As to a trustee's power to incur expenses, see Chapters XLVII and XLIX.

A trustee is not compelled to give up any property in his charge until all proper expenses and disbursements made by him during his period of trusteeship have been repaid. Such expenses are considered a lien upon the estate.

§ 461. Rules in Regard to Compensation

In the United States it is the rule that executors, guardians, and trustees, should be paid for the services they render, and that it is not reasonable to expect gratuitous services in the care of property from capable business men. If, however, from the instrument creating the trust it seems that no compensation for the trustee was desired or ordered by the maker of the trust, no compensation will be allowed.

The statutes of the various states mention only the fees or compensation of executors, administrators, and guardians, but the equity courts by construction, and by enlarging upon their jurisdiction, have made the statutes include also "trustees."

In some states the court in its discretion awards compensation; in some the statute prescribes a commission and sometimes a per diem rate; and in others, fees and per diem rates were established long ago, and are now absurdly low.

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When the executor or the trustee has caused loss by his negligence or mismanagement, he forfeits any claim to compensation.

§ 462. Amount of Compensation

In New York 5 per cent is allowed on the first $1,000, above that and up to $10,000 the rate is 2½ per cent, and on anything above that the commission is 1 per cent. If there are more than one executor, no additional fee is allowed unless the estate is worth over $100,000, in which case each executor will receive the full amount. When executors are afterwards trustees and the two functions are distinct, a separate compensation will be allowed for each service. Some of the other states are more liberal and give 5 per cent without regard to the amount. In California the fee is 7 per cent on the first $1,000, 4 per cent on the next $9,000, 3 per cent on the next $10,000, 1 per cent on the next $50,000, and ½ per cent on all others above that. In Massachusetts the trustees are awarded such compensation as the court may order, and this will vary according to the time and labor involved, the size of the estate, and the ideas of the court. In Virginia, the courts allow a commission of 5 per cent, though in cases where the duties of the trustee have been long and arduous and the responsibility great, a larger percentage has been allowed. In Alabama, no statute has determined the rate of a trustee's compensation, and it is determined upon the labor and trouble of the trustee, though generally the percentage allowed is 5 per cent. In Ohio, the rate is 6 per cent upon the first $1,000, 4 per cent upon the next $4,000, and upon all sums in excess of $5,000, 2 per cent. The court may also make such further allowance for extra services and expenses as is reasonable. In Illinois, trustees receive no compensation except under a special stipulation, but even under such stipulation, no allowance can be made for extra service in making journeys to collect debts

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or claims, nor for defense in a suit against the estate, nor for services in defending a suit against the estate.

When a legacy is left to an executor, he will not be allowed also to receive commissions unless the will directs that the legacy is in addition to the commissions.

In those states where the allowance of compensation is in the discretion of the court, any misconduct on the part of the trustee causing loss will be ground for cutting down his compensation or for refusing it altogether.

In the will of Henry C. Frick, $100,000 was left to each of the executors.

Review Questions

1. Why were trustees allowed no compensation in England? What is the rule in your state? Are trustees of public institutions entitled to compensation?
2. What is the rule as to repayment of disbursements by a trustee? What is a trustee's duty as to money paid out?
3. Why are trustees compensated in the United States? How is this compensation ascertained in your state? If the trustee is negligent or mismanages the property, does it affect his claim for compensation?
4. When executors are later trustees, does that fact affect their commission? When a legacy is left to an executor, does that affect his compensation?

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CHAPTER LV

TERMINATION OF TRUST

§ 463. How a Trustee Is Discharged

When a trust is terminated, the trustee is discharged. The trustee, however, may be discharged under some circumstances that do not involve the termination of the trust. The other trustees or a trustee appointed to fill the vacancy will continue the trust. A trustee may be discharged in the following ways:[1]

1. The fulfilment of the trust. In such case, the trustee should have a release from those to whom he has transferred the trust property, or he should have an order of court authorizing him to distribute the property, which, when done, would terminate the trust. In the case of an executor, he would have to file his accounting and its approval would discharge him.

2. By unanimous consent. If all the *cestuis que trust* are of age and consent, the trustee may be discharged and in many cases the property may be transferred and the trust may be terminated.

3. By removal for cause. If the trustee is guilty of misconduct, is incapable, refuses to obey orders of court, or has left its jurisdiction, he may be removed. This terminates his connection with the trust but does not end the trust.

4. The loss of the trust property by litigation or otherwise would, of course, by taking away the subject matter, end both the trust and the trusteeship.

5. The death of the trustee would end the trustee's con-

[1] Perry on Trusts, § 921.

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nection with the trust, and a successor could be appointed, or his heirs or whoever else got hold of the property would take subject to the trust.

§ 464. Termination of Trust by Fulfilment

A trust is created to attain some object and is limited in duration to a specific time or until a specific thing is done. When the thing is done or the period has expired, the trust must end. A trust in funds left to buy certain property which was to be deeded to the testator's son when he attained his majority, would obviously end when the young man grew up and received the deed from the trustees.

A trust in property, the income from which was to be given to the testator's wife while she remained his widow, then to be conveyed to the testator's brothers and sisters, would end when the *cestui que trust* died or married again and the property had been conveyed to the remainder.

Any trust that has been fulfilled is accomplished and ended by the fulfilment. If the trustee has fulfilled it, he should have evidence in some shape of what he has done. This may be a release from the *cestui que trust,* or an account approved by the court, or a formal report made to a court of compliance with its order.

§ 465. Termination of Trust by Consent

A trust for a particular purpose, as to give a daughter an income for her life, cannot be terminated during her life; but there are trusts in which there is no obligation to the creator of the trust, or where it has become impossible to carry out the trust. In such cases, if all the *cestuis que trust* are of age and all agree that the trust may be terminated, courts of equity will decree the termination of the trust and direct that the property be distributed to those entitled to it. If any of the parties interested are minors or are otherwise inca-

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pacitated to give legal consent, it would not be possible to obtain the necessary unanimous consent.

A trust for the benefit of a married woman is usually considered to have been created for the purpose of protecting her property from her husband or his creditors. In case of the death of the husband, the courts have, on application of the woman, decreed a termination of the trust.[2]

§ 466. Trusts That Cannot Be Terminated by Consent

Many trusts are formed expressly to prevent the *cestui que trust* from selling or disposing of the trust property. In such case, to allow the trustee and the beneficiary to agree to terminate the trust would defeat its primary object. In other cases a trust is created to provide a safe income for a wife or a daughter unskilled in managing property. Here again, the trust cannot be dissolved by agreement of the parties, even though of age. Generally, if the termination of the trust would defeat the intention of the creator of the trust, it will not be dissolved by consent of the trustee and the beneficiaries, even though all the beneficiaries are of age.

§ 467. Formalities of Termination

Executors and administrators, when they have settled the estate, paid all lawful debts, satisfied all legacies, and had their accounts approved, will be discharged by the court. If they are also trustees, the trust may run on for years after the estate has been settled. When the trust has been fulfilled, it would be the duty of the trustees to transfer or convey the property to those entitled to it according to the terms of the trust instrument.

It is usual for trustees, on making this final distribution, to secure a formal release of all claims from all who receive any of the property and are competent to consent.[3]

[2] Perry on Trusts, § 920.
[3] Perry on Trusts, § 922.

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If there are any doubts as to the rights of any party to receive, or if there are rival claimants, or if there is any possibility of trouble in the future, the trustees may require a bond of indemnity from the beneficiaries or may decline to act without a decree of court.

If any are not of age, they cannot consent, and cannot release nor give a bond of indemnity. In such case, the trustee can readily secure evidence of the transfer and may be willing to risk payment, or he may refuse to act save on an order of court.

A receipt and a release are not conclusive, but they are *prima facie* evidence and require strong proof to set them aside.

A decree of court directing a particular distribution relieves the trustee from all responsibility and he would need no release, but prior to the decree the trustee must have made known to the court all facts bearing on the situation. A decree based on misinformation could be set aside.

If trustees pay over money to the wrong person, the right person can later make them pay it again. A trustee is not required to take any risk, hence in any case that is doubtful he may refuse to act until he has a bond to indemnify him in case of trouble, or he may decline to do anything until compelled by decree of court.

A trustee may pay money to the agent of the real party in interest. Before doing so, he must satisfy himself by some written evidence signed by the parties, that the agent is authorized to receive it. If the *cestui que trust* were abroad he could, by power of attorney, authorize an agent here to collect for him. This power of attorney would be revoked by the death of the *cestui que trust.*

The costs of winding up a trust and distributing the money, and all expenses for documents, deeds, and other papers must be paid from the trust fund.[4]

[4] Perry on Trusts, § 933.

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Review Questions

1. When is a trustee naturally discharged? Under what other circumstances would a trustee be discharged?
2. When is a trust fulfilled? What evidence should a trustee have of the fulfilment of his trust?
3. When will courts of equity refuse to terminate a trust though all interested consent? If a trust were made for a married woman and her husband died, could the trust be terminated?
4. A testamentary trust provided that the income be paid to a widow during her life, and on her death the principal be divided among her children. If the children all were of age, could they ask the widow to terminate the trust by consent? Give reason for your answer.
5. What must be done before an executor is discharged? If an executor were also a trustee, what would he have to do? What should be secured as evidence of final distribution? If there should be conflicting claims for any part of the estate, what should the trustee do? In case of minors, what may a trustee do? What is the effect of a decree of court? If a trustee by mistake pays the wrong party, what is the result?

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PART V

BANKS AND TRUST COMPANIES AS TRUSTEES

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CHAPTER LVI

A FINANCIAL CORPORATION AS EXECUTOR, ADMINISTRATOR, OR TRUSTEE

§ 468. Introductory

In taking up this part of the subject, it is assumed that the reader has read the foregoing chapters and is therefore familiar with the various fiduciary capacities and knows the duties of each. Therefore no attempt is made in this and the following chapters to define the various terms or to describe the various duties. The term "fiduciary" is often employed because it includes all of the differing capacities, such as executor, administrator, trustee, guardian, committee, etc.

§ 469. Choosing an Executor

In former times, when a man was about to make a will or execute a trust, he cast about him to find someone among the members of his family or his friends whom he believed to have the necessary qualifications to administer his estate and distribute it among those named in the will, or to execute the terms of a trust. It is by no means an easy matter to find just the right person, who is also willing to undertake the burden which the testator desires to impose.

In our modern civilization this difficulty may easily be obviated. Banks and trust companies are empowered to act in such capacities. The custom of appointing a bank or a trust company is becoming universal, and as time goes on and the science of fiduciary work is more highly developed, the appointment of an individual instead of a bank or a trust company will be unusual.

Executors, administrators, trustees, guardians, committees,

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conservators, curators, agents, and all those who hold other people's property for them, are fiduciaries. Therefore, a fiduciary is one who holds something—property, money, or the right to either—in trust for another. He is a trustee.

§ 470. Financial Corporations as Trustees

Any person who is capable of making a contract—that is, any person twenty-one years of age or upwards and of sound mind—may act as a fiduciary; and in a sense, although it may not be by formal act, we all function as fiduciaries from time to time, as when any one of us invests money for another. In addition to individuals, national banks, trust companies, and, in many states, state banks may act in any or all of the fiduciary capacities; and it is to the work of these institutions in their fiduciary capacities that this and the following chapters will be devoted.

§ 471. Trust Companies and State Banks as Trustees

For many years, or to be more exact, since the early part of the nineteenth century, trust companies have had these fiduciary capacities. In the earliest times, special charters giving trust powers were obtained from the state legislatures. Recently trust powers have been conferred by the various state banking corporation laws, so that at the present time such rights may be obtained in the same manner that any financial corporation obtains its right or license to do business. It is of course necessary that the provisions of the banking corporation law of the particular state be exactly complied with.

In the case of state banks, the conferring of fiduciary powers has arisen since the federal law granting national banks such right or power went into effect, and is, therefore, of recent origin. It is only by virtue of the banking law of the state of location and under which the bank is incorporated, that a state bank can be empowered to exercise trust functions.

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§ 472. National Banks as Trustees

Originally, only trust companies had fiduciary capacity, but by virtue of the Federal Reserve Act the same power was given to national banks. Section 11 K of the Federal Reserve Act provides that:

> The Federal Reserve Board shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies or other corporations, which compete with national banks, the granting to and exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of the act.

The fiduciary power of trust companies and state banks has not been questioned, but the right of a national bank to maintain a trust department has been seriously questioned in various jurisdictions; and in each instance where the courts have been called upon for a decision, they have decided in favor of the national banks.

§ 473. Decisions of the Courts

In the leading case[1] on the question the late Chief Justice White of the Supreme Court of the United States wrote the opinion. The rule was there laid down that, although a certain business may be of a private nature and subject to state

[1] First Nat. Bank v. Fellows ex rel. Union Trust Co., 244 U. S. 416.

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regulations, if it is of such a character as to be successfully discharged by a bank chartered by Congress, Congress has authority to give the bank power to transact such private business. This rule precludes the state—although it may in a general sense possess authority to regulate such business—from using its authority to prohibit such business by national banks, since to do so would be an effort on the part of state authority to prohibit Congress from exercising a power which under the Constitution it has been given ample authority to exercise.

The Chief Justice further points out that it follows that, although a business is of such character that it is not necessarily susceptible of being included by Congress in the powers conferred on national banks, yet such powers could be conferred if by state law, state banking corporations, trust companies, or others which are rivals or *quasi* rivals of national banks, were permitted to carry on such business. This must be the case, since the state may not by legislation give an advantage to the competitors of national banks and at the same time deny the power of Congress to meet such created competitive condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency.[2]

§ 474. All State Rules Must Be Obeyed

In order that any bank, either national or state, or any trust company, may maintain a trust department, it is a condition precedent, established by the laws of each state and by the Federal Reserve Act, § 11 K, that the statutes of the state where the bank or the trust company is located, be complied with. For example, it is usually provided that the bank or the trust company must have a certain minimum capitalization, fully paid, and a certain surplus. Bonds equal to a certain

[2] See also Hamilton *et al*, decided April, 1920, in the Supreme Court of Connecticut; In re Estate of Stauchfield, Supreme Court of Wisconsin, June, 1920. (These cases have not yet been published in the law reports, but will appear shortly.)

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percentage of the capital must be deposited with the superintendent of banks or other state official vested with control of such matters. In New York State the minimum paid-in capital of a trust company must be $100,000 in a city with not over 25,000 population, increasing to $500,000 in cities of over 250,000. Also, each stockholder is liable for an additional amount equal to the par value of his stock. Bonds equal to 10 per cent of the total capitalization must be deposited with the superintendent of banks. This deposit is to secure trust funds and the operations of the trust department. In the case of insolvency of the bank or the trust company, the beneficiaries of trust funds have a prior lien or right as to this deposit. The deposit may be in securities acceptable to the state banking department or, in some states, in the form of a surety company bond.

These rules apply to all banks maintaining a trust department, and to national banks, as well as to state banks or trust companies.

§ 475. How Trust Assets Are Protected [8]

National banks exercising any or all of the powers given them under the act must segregate all assets held in any fiduciary capacity from the general assets of the bank and must keep a separate set of books and records showing in proper detail all transactions engaged in under authority of the act. Such books and records are open to inspection by the state authorities to the same extent as the books and records of corporations, organized under state law, that exercise fiduciary powers. There is nothing in this act, however, authorizing the state authorities to examine the books, records, and assets of a national bank which are not held in trust under authority of this act.

No national bank may receive in its trust department de-

[8] See Federal Reserve Act, § 11 K.

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posits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank, awaiting investment, must be carried in a separate account and shall not be used by the bank in the conduct of its business unless it first sets aside, in the trust department, United States bonds or other securities approved by the Federal Reserve Board, to an equal amount.

In the event of the failure of such bank, the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart, in addition to their claim against the general assets of the bank.

Whenever the laws of a state require corporations acting in a fiduciary capacity to deposit securities with the state authorities for the protection of private or court trusts, national banks so acting are required to make similar deposits; and securities so deposited shall be held for the protection of private or court trusts, as provided by the state law.

National banks in such cases are not required to execute the bond usually required of individuals if state corporations, under similar circumstances, are exempt from this requirement. National banks have power to execute such a bond when so required by the law of the state.

In any case in which the laws of a state require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice-president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

It is unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officers, director, or employee making such loan or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more

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than five years, or may be both fined and imprisoned, at the discretion of the court.

§ 476. Rules as to Issuance of Permits to National Banks [4]

In passing upon an application for permission to exercise the powers enumerated in this act, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus are sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly:

> Provided, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by state law of state banks, trust companies, and corporations exercising such powers.

Application by national banks should be made to the Federal Reserve Board on forms provided by that board.

§ 477. Management of Trust Funds by National Banks

The trust department of a national bank must keep books and records separate and distinct from the books and records of the commercial departments. They must be open for inspection of federal or state authorities at all times.

The trust department of a national bank and all trust securities and investments must be placed under the management and joint control of two officers or other employees designated by the board of directors and whose duties are prescribed by the said board. All such officers or employees should be bonded. Because of the difference in the laws of the various states governing the relation of fiduciary and beneficiary, the Federal Reserve Board has not considered it practicable to formulate a uniform set of by-laws for national banks which

[4] See Federal Reserve Act, § 11 K.

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have been granted authority to exercise trust powers. Nor has it in any other manner attempted to define the duties and powers of the officer or officers in charge of the trust department of national banks. The precise duties and powers of these officers is a matter for the determination of the board of directors of each bank.

When national banks about to open trust departments have asked the Federal Reserve Board for information as to the proper manner of conducting those departments, the board has suggested in each case that the trust department be placed under the management of a competent and experienced trust officer, and that competent local counsel be employed to assist in prescribing the duties of that trust officer and to advise with reference to the exercise of the bank's trust powers.

§ 478. Rules as to the Investment of Trust Funds

In connection with § 11 K and in answer to inquiries, the Federal Reserve Board has promulgated certain regulations known as Regulations F. Before a national bank attempts to instal a trust department, a careful study of Regulations F, as well as § 11 K, is necessary. Only part of these regulations are given in the text. Funds held in trust must be invested in strict accordance with the terms of the will, deed, or other instrument creating the trust. Where the instrument creating the trust contains provisions authorizing the bank, its officers, or its directors to exercise their discretion in the matter of investments, funds held in trust may be invested only in those classes of securities which are approved by the directors of the bank. It was not intended, however, to require that each particular investment of trust funds be specifically approved by the board of directors, but merely that the directors define the classes of securities in which trust funds may be invested in those cases where the bank is authorized to exercise its discretion. Where the instrument creating the trust does not

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specify the character or the class of investments to be made and does not expressly vest in the bank, its officers, or its directors, a discretion in the matter of investments, funds so held in trust must be invested only in those securities in which corporate or individual fiduciaries in the state in which the bank is located may lawfully invest.

§ 479. Rules as to Court Trusts

A national bank acting as executor or administrator or in any other fiduciary capacity, under appointment by a court of competent jurisdiction, must make all investments under an order of that court, and copies of all such orders shall be filed and preserved with the records of the trust department of the bank. If the court, however, by general order vests a discretion in the national bank to invest funds held in trust, or if, under the laws of the state in which the bank is located, corporate fiduciaries appointed by the court are permitted to exercise such discretion, the national bank so appointed may invest such funds in any securities in which corporate or individual fiduciaries in the state in which the bank is located may lawfully invest.

§ 480. Trust Funds Awaiting Investment

Funds received or held in the trust department of a national bank, awaiting investment or distribution, may be deposited in the commercial department of the bank to the credit of the trust department, provided the bank first delivers to the trust department, as collateral security, United States bonds, or other readily marketable securities owned by the bank, equal in market value to the amount of the funds so deposited.

Before a national bank deposits any of its trust funds in its commercial department, it must deliver to the trust department securities of the kinds and in the amounts specified in this section of the regulation. A deposit of securities with the state

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banking authorities, as security for court and private trusts generally, is not a compliance with the requirement quoted above.

Review Questions

1. What is the meaning of the word "fiduciary"? What are the usual fiduciary relations?
2. What are the qualifications of an executor? Why is it difficult to select an individual executor?
3. Who may act in a fiduciary capacity? What institutions may act as trustees?
4. How long have trust companies had such power? Why have state banks been authorized to exercise trust powers?
5. When were national banks authorized to act as trustees? Under what circumstances are they permitted to act?
6. What did the courts decide as to the exercise of trust powers by national banks?
7. Are state laws regulating corporate trustees binding on national banks? What minimum paid-in capital is required for trust companies in your state? How are the beneficiaries of trust funds protected in your state?
8. How are trust funds segregated? What is the rule as to state inspection of the trust department of a bank? May trust funds be used as any other deposit? What is the rule as to this? Is there any other law in your state to secure trust funds in banking institutions? Who must make any affidavit required?
9. Who has authority to issue permits to national banks to exercise trust powers? What are the minimum requirements in your state? Who has charge of the trust business in a bank?
10. Who manages the trust department of a national bank? Why does the management of such a department vary in the different states?
11. How must trust funds be invested? Who decides on investments left to "the discretion of the bank"? What are the statutory rules in your state as to investments of trust funds?
12. What are the general rules as to banks appointed to execute trusts under an order of court?
13. When may trust funds be deposited in the commercial department as other funds are deposited? Does the general deposit prescribed by statute cover such deposits?

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CHAPTER LVII

ADVANTAGES OFFERED BY CORPORATE FIDUCIARIES

§ 481. Difficulty of Selecting a Suitable Executor

The advent of the bank in a fiduciary capacity is comparatively recent. Even the trust company acting as fiduciary gives a service with which the public at large is more or less unfamiliar. It is the purpose of this chapter to point out some of the many advantages of a bank or a trust company as a fiduciary over the individual.

When a person prepares to execute his last will and testament, one of the first difficulties to confront him is the selection of an executor and trustee. He must select someone who will in all probability survive him. He hopes that the person will live to administer the estate and to execute the trusts created by the will.

The uncertainty of human life is such that no matter what care is used in making the selection, the person chosen may die before the testator or before completing his executorship, or if more than one is appointed, all may die or otherwise become incapacitated and therefore unable to execute the trust.

§ 482. Why a Bank or a Trust Company Is to Be Preferred

If a bank or a trust company is designated, all this difficulty is avoided. The life of the corporate executor or trustee is perpetual. In the nature of things it cannot become ill or incapacitated.

By the terms of a certain will, trusts were set up, and three persons designated as executors and trustees. Two of them

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were friends of the testator and the third was the testator's wife. The testator died and all three executors duly qualified.

Before the trusts terminated, one of the friends resigned; then one died. The widow continued to act for a number of years and then she died. Her oldest son made application for appointment. He was then a middle-aged man of robust health. However, on the very day he was appointed word was received by his attorney that he had died the previous day.

Then followed further difficulties, and unpleasant litigation was avoided only by a compromise arrangement which provided for the appointment of two trustees, neither of whom had had any previous experience and one of whom was unqualified for the duties of trustee by human frailties. Neither of them would ever have been selected by the testator. Had he in the first place designated a bank or a trust company as his executor and trustee, none of these difficulties could ever have arisen.

The corporate fiduciary, whether a bank or a trust company, never becomes ill. It never goes on a vacation or a business trip. It is always at its place of business, ready to attend to the affairs of the estate entrusted to its care.

How often does it happen in the case of an individual executor or trustee that, at the very time it is necessary to see him about some business of the estate, he is away, or is unable to attend to it, no matter how vitally important it may be, because he has been ill or has been called away on his own affairs?

§ 483. The Accessibility of a Corporate Fiduciary

An important consideration in the selection of a fiduciary is accessibility. A bank or a trust company is always accessible. Its office is centrally and, to all intents and purposes, permanently located. An individual frequently moves his office or his residence. Both office and residence may be and often are

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out of the way. People who have business to transact with the estate may not find it easy to locate the individual executor's place of business. Practically everyone knows the location of the bank or the trust company. Also everyone is familiar with the regular business hours of the bank or the trust company, whereas the business hours of individuals vary with the nature of their businesses.

§ 484. Competency of Corporate Fiduciaries

Acting in a fiduciary capacity is a business in and of itself. It requires a great deal of study and experience. How many individuals have ever studied the duties of a fiduciary? How many have had any experience in a position of this kind? To be sure, a few individuals have acted in some one of these capacities once or twice before, but how far that is from making them expert!

Is it reasonable to expect an inexperienced person, even though well educated and intelligent, to transact an important piece of business with very little or no previous preparation, and about which he has hitherto known almost nothing? Then how evident it is that a testator should not appoint an executor or a trustee who has no training or experience in that capacity.

A man should always realize that the work of his lifetime, namely, the building up of sufficient means to provide for his family after he has gone, may be defeated by the acts of an inexperienced fiduciary. Remember that in such case there is no indemnity to be obtained because executors often do not have to file bonds, and even when required to do so the bond can be relied on only for infidelity, that is, to make good positive dishonesty.

On the other hand, a bank or a trust company is thoroughly experienced in all these fiduciary capacities and may be said to be fairly expert. The men in charge of the work are handling the business of the fiduciary every business day of

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the year. They are selected by the bank or the trust company because of their knowledge and previous training. So many and such a variety of cases have passed through their hands, many of them extremely complicated, that whatever the situation that confronts them, it will be handled in the manner bringing the best results to the estate and therefore to the beneficiaries.

§ 485. The Manifold Duties of an Executor

When a person of large or comparatively large means dies, the administration of his estate necessarily involves a great deal of detail work. It takes much time for the executor to work out these details, as anyone at all familiar with administration matters must realize. Some of these matters have already been given in the earlier chapters of this work, but for the sake of emphasis we shall repeat some that have to receive attention.

The personal representative (executor or administrator), having qualified, must then collect all the assets of the estate. These may, of course, be in many different forms and in many different places. Usually, one finds several savings bank accounts, a number of investments in stocks and bonds of corporations, very likely a number of bonds and mortgages on real property, and frequently an interest in a going business.

The personal representative must also prepare to pay all the debts of the decedent. Whether or not he is required to advertise for claims against the decedent, it is better practice to do so both as a matter of protection to himself and because by so doing he can settle the estate within a shorter period —in New York within six months—than he could if he did not advertise. He must also receive and record all claims against the estate. Properly none of these, except possibly the undertaker's bill, should be paid until all of the known claims have been filed and the time of filing has expired, so that there can

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be no claim of a preference in favor of one creditor over another. Careful records should be kept of both the receipt of principal and income of the estate and of claims against the estate.

§ 486. Necessity of Keeping Accurate Records [1]

Any person acting as the personal representative of a decedent owes it to the beneficiaries of the estate and to the friend who has appointed him in this capacity to keep accurate and honest records of all his transactions. Not only does he owe this to the beneficiary and to the decedent, but he should also do so for his own protection and in order that he may at the proper time be able to give an accurate and true account of his proceedings.

In spite of this, however, it is not an uncommon thing for an individual acting as personal representative to keep no records other than a check-book. His only records of the claims against the estate are the bills themselves, which he does not enter in any book of account. Such an individual usually leaves all of his duties to be carried out by the attorney for the estate and acts more or less as an automaton in signing checks and documents when and as requested by the attorney, taking it for granted that the attorney will always advise him correctly. It is probably true that the attorney would advise him correctly, but that does not relieve the personal representative from the duty of knowing that what he is doing is what should be done. The attorney should be called upon for legal work only, that is, to advise as regards the legal points that come up in connection with the administration, and to draw up the various papers, including the petitions and accounts of proceedings, the decrees, and such other legal documents as there may be. The attorney, of course, should be called upon to prepare any needed releases or satisfactions of mortgages.

[1] See Chapter LXV, "Purpose and Theory of Estate Accounting."

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§ 487. Care Required for Manifold Details

It is the duty of the personal representative to attend to all of the administrative details. An individual acting in a fiduciary capacity usually cannot give the attention he should to his duties for the reason that he has the business of making his own living and the care of his own personal and business affairs, which are naturally likely to come first. In selecting an executor it is usually preferable to take a person who has proved his ability by attaining success in his own business, but the reason for his success, in ninety-nine cases out of a hundred, would be the careful attention which he had always given to his affairs, and if he is to continue to manage them successfully he will be compelled to give them this same unremitting attention in the future. It is obvious that this means that the matter of his fiduciary duties will receive only secondary attention.

The importance of these duties is pointed out for the purpose of emphasizing that they require and should have careful attention and should be the primary concern of the executor. When a bank or a trust company is appointed in a fiduciary capacity, it gives the matter of handling the affairs of the estate or trust all the attention that it may require. Acting in the various fiduciary capacities is the chief and only business of the department of the bank which handles this sort of work, the trust department. That department has nothing to demand its attention other than the affairs of the estates in which it is acting as fiduciary. Therefore those affairs receive the primary attention to which they are entitled. This alone is sufficient reason for preferring a corporate fiduciary.

§ 488. The Question of Expense

There are many considerations which one must have in mind when he is about to make his will or to prepare any instrument creating a trust. Among these various considera-

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tions, a very important one from the standpoint of the beneficiary is that of expense.

The question that then arises is whether it is more expensive to appoint A or B and C (individuals) as one's executors and trustees than to appoint a bank or a trust company. Naturally there are fees and expenses to be paid in any case, but in which case will the fees and expenses be least?

In all states there are statutory provisions providing for the fees of fiduciaries. In some states the fees are definitely fixed, as in New York. In others the matter is in the discretion of the surrogate's or the probate court within certain limitations, as in New Jersey. Whatever the statute may provide, it is the same for a corporate fiduciary (bank or trust company) as it is for an individual. So that as to fees as such there is no choice.

As to the fees of the lawyers who must be retained to probate the will and to advise the fiduciary, and who must attend to the many legal matters involved in the administration of an estate, there is likely to be some difference. Where an individual acts, he is almost entirely dependent upon the attorney for instruction in his duties. As has already been said, the individual in the great majority of cases does little or nothing himself but leaves it all to the attorney, even to the keeping of the proper records. This is shown in almost every instance where a corporate fiduciary retains an attorney whose previous experience has been with the individual. Such an attorney enters upon his duties as if he himself were the fiduciary and in some cases seems to feel aggrieved because the corporate fiduciary expects really to be the executor or trustee and to exercise all official functions.

If the executor utilizes the attorney in this way, the estate for which he is acting pays for it. The attorney cannot and should not be asked to devote his time to matters which are really no part of his work unless he is to be paid for it. Since

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the fiduciary is getting his fees for this very work, the estate is practically paying double. In fact it is being charged not on the basis of the rather small fees allowed to the executor, but on the basis of the fees that the attorney believes to be a fair return for his professional services.

Where a bank or a trust company acts as fiduciary, it takes care of all these details. It obtains the surrogate's certificates, comptroller's waivers, and other documents required in the liquidation of the assets of an estate. It prepares the statements for the attorneys to make up the transfer or inheritance tax affidavits, the federal estate tax affidavits, and the intermediary or final judicial account of proceedings. It takes care of the distribution of the proceeds of the estate, taking the proper receipts and releases which have been prepared by the attorneys.

Moreover, where a large financial institution acts in a fiduciary capacity, it naturally can and does exert a control over the attorneys, especially if the attorneys happen to be the regular counsel for the bank or the trust company, as is usually the case. In a proper case the fee can be adjusted. We do not mean that it is the practice of banks or trust companies to cut the fees of the attorneys, but the attorneys sometimes may overestimate the ability of the estate to pay, in which case it is proper to call their attention to the matter. The individual, on the other hand, would probably be unable to accomplish much along these lines. It is fair then to say that from the standpoint of the legal expense the bank or the trust company would be likely to be the less expensive fiduciary.

§ 489. Individual Administration of Large Estates

Let us go a step further. Consider, if you will, a large estate involving several trusts and in which the administration is complicated. Let us suppose that the trusts are likely to last for many years. Assume that among the assets there are

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various pieces of rentable real property, such as tenement houses and stores, that there are also bonds and mortgages on real property, and in addition investments in corporate bonds, etc. If three individuals were acting, where the estate exceeded $100,000, as in such case it would, there would in the state of New York be three full commissions to be charged against both principal and income. The bank or the trust company, unless there were co-executors or trustees, could charge only one set of commissions.

In the case cited, the individual executors and trustees would have to establish an office and a force of clerks to handle the affairs of the estate. They would have to have a safe-deposit box in which to safe-keep the securities. The expenses for all this, rent, salaries, stationery, telephone, etc., would be a proper charge against the estate, chargeable partly against principal and partly against income. There are many instances of just such cases of costly administration as that recited above.

If a bank or a trust company were the executor and trustee, either solely or jointly with an individual, all of these items would be considered overhead and no charge would be made and no part of the expense of this nature would come out of the estate. In other words, the bank or the trust company is equipped to handle just such estates, and can take care of the big ones as capably and as efficiently as the small and at less expense than can the individual fiduciary.

Individuals acting as administrators, executors and trustees are usually required to file bonds unless the will provides that they shall not. However, in the case of substituted trustees, that is, where the original trustees have died or resigned and new ones are appointed, they will in all cases be compelled to file a bond before they can qualify. The premiums for these bonds become quite a large item where the estate is of any size. Where there are trusts, the premium is payable every year.

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When a bank or a trust company is appointed, no bonds are required because of the fact that they have great resources back of them in addition to having deposited securities with the banking authorities of the state in which they are located, and in the case of national banks there is further protection, as shown supra in § 11 K of the Federal Reserve Act.

§ 490. Care Required to Conserve Income

The fiduciary should consider not only the reduction of actual expense, but also any other economies or saving that can be accomplished. When an individual is the fiduciary, we must consider the waste incident to separate action as well as the fact that he has his own affairs to attend to, which, as has been said, will receive his first attention.

In an estate of any size, there will be income falling due from time to time. In many instances this will come from corporate bonds and from real estate bonds and mortgages. If there are corporate bonds, in most cases they will be coupon bonds. These should be kept in a safe-deposit box. The individual must therefore go specially to the safe-deposit box to cut coupons, or if the bonds are maturing he must get the bonds themselves to present for payment. He must prepare the ownership certificates called for by the Federal Income Tax Law. He must know or ascertain the status of the bonds as to tax free covenant clauses. With all this before him, how often does he present the coupons on the due date? Remember he has his own private affairs and business to attend to and these are side issues. As a matter of fact, experience shows that the individual, to say the least, is very irregular as to the time of presentation of coupons and even of maturing bonds, and is frequently from one day to a month or more, in extreme cases, behind time. Every day's delay is a loss of interest to the estate of which he is the executor, administrator, trustee, or other fiduciary.

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If a bank or a trust company were acting as fiduciary, the coupons or the maturing bonds, as the case might be, would be actually collected on the date due and the money reinvested promptly, so that there would be no lapse of time during which the money was not earning interest, and there would be no delay in making distribution of income if that was the duty of the fiduciary. If one would just consider the loss of interest on, say, a $10,000 bond maturing at a certain date because of the failure to present that bond when due, then one would realize the saving to the estate that results by reason of the fiduciary's acting promptly in such matters.

§ 491. Corporate Fiduciaries for Long Terms

Where a will creates a trust estate, that is to say, where an estate is held for a number of years for the benefit of the widow or the children of the testator, or both, as the case may be, the trustee has duties of considerable responsibility to perform. The executor has, as has already been shown, the duty of administering the estate; that is, of liquidating it, including the collection of all principal and the turning of it into cash, and the payment of all debts. The executor must then render his final account of proceedings, which is then passed upon by the probate or the surrogate's court having jurisdiction thereof. The decree confirming the account of proceedings as rendered by the executor, and with such amendment as the court shall deem to be proper, will provide for the turning over of the trust funds to the trustee.

The trustee may be the same person as the executor, but the duties of the executor and of the trustee are distinct from each other. What is turned over to the trustee by the executor will be for the most part cash. The trustee then has the duty of investing this cash in accordance with the statutes in regard to trust investments or in accordance with the terms of the will, as the case may be. It should be pointed out that the

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statute provides that trust funds shall be invested only in certain securities, eligible for trust funds. What these securities are, however, differs in the different states. In New York the trustee may invest in the same securities that are eligible for investment by savings banks or insurance companies. However, a testator may provide in his will that the trustee is not bound by the statutory limitations with respect to investments, and that he may use his judgment as to what kind of investment he will buy for the estate.

Therefore, the person about to make a will containing any trust provisions should consider the qualifications of the executor and the trustee, especially the latter, with respect to his judgment in making investments and also to his knowledge of what constitutes a legal investment for trust funds and of general market conditions. Probably there are few individuals other than those actually engaged in the buying and selling of securities, who are really familiar with market conditions.

§ 492. Corporate Fiduciaries Are Skilled in Making Investments

A bank or a trust company has generally had extended experience in buying securities for investment. Not only is it doing this sort of work for other trusts in which it is acting, but it is buying securities for investment for many of its customers all the time. The bank or the trust company, furthermore, has the very best information obtainable on all conditions with respect to bonds and other securities, and it has the means of obtaining practically any information that is obtainable at all as to the various kinds of securities in which money may be invested, whether it be securities known as "legal investment for trust funds," or the ordinary bond or the preferred stock of a corporation. Therefore the bank is able to obtain the best possible prices when selling and the lowest prevailing prices when buying.

Furthermore, a bank or a trust company is in a position

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to obtain a knowledge of market conditions not only in the particular vicinity where it is located, but also throughout the world. The larger the institution is, the better its facilities for obtaining this knowledge. For example, some of our larger banks and trust companies have branches in foreign countries. All of the large banks have representatives in foreign countries. Also they have men traveling over all the United States and Canada, whose duty it is to report upon conditions in special localities, so that at all times the bank or the trust company is kept informed as to the present conditions and what they are likely to be. This knowledge is extremely helpful in making investments of trust funds.

§ 493. A Case in Point

There is a New York case in connection with the administration of an estate which would seem worth while considering: A certain man died leaving a widow and a daughter. At the time of his death he was a member of the New York Stock Exchange and also a member of a firm doing business as brokers in Wall Street. The testator directed in his will that his seat on the Stock Exchange should be sold as soon as possible after his death. The testator appointed his partner and his personal attorney as his executors. The partner advised against the immediate sale of the seat on the Stock Exchange, believing that it would increase in value, but instead of increasing in value the reverse occurred. Eventually the widow demanded an accounting and then proceeded to surcharge the accounts of the executors because they had failed to sell the seat on the Stock Exchange as directed by the will. She proved that it would have been possible to sell the membership for a price of about $80,000, whereas at the time of the accounting the price of the membership was $56,000 to $57,000. The surrogate surcharged the account of the executors with the difference betwen $80,000 and $56,000, or

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$24,000. The executors had to take this out of their own pockets. Fortunately for the widow and the daughter, the executors were men of means and therefore no loss occurred to the beneficiaries. If, however, the executors had not been well-off men, the widow and her daughter would have suffered by reason of the loss, because in this particular case no bond had been required. The case was appealed, and in the court of appeals the decision of the surrogate was affirmed in all respects. It cost the executors $12,000 each and the costs of litigation.

Review Questions

1. Why is the uncertainty of life an objection to the appointment of an individual as executor?
2. What are the obvious advantages of having a corporate trustee?
3. Why is a corporate trustee more accessible than an individual trustee?
4. Why is a bank or a trust company more competent than most individuals? Why is it more responsible? What are the advantages of experience?
5. What are the principal duties of an executor or an administrator as to collecting assets? As to paying debts? As to keeping records?
6. Why must an executor or an administrator keep careful books of account?
7. Why are most men, though otherwise qualified, unable to give the time demanded by the office of executor? Why is a bank or a trust company able to do this?
8. How would individual administration compare with corporate administration as to expense? What are the fees in your own state? What can be said as to fees paid lawyers?
9. How is a large estate administered when the executors are individuals? How would a bank or a trust company save here? Do corporate fiduciaries have to file bonds?
10. What care is necessary in collecting income? Why can the financial corporation do this better and more economically?

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11. Why is a corporate trustee most advantageous for long-term trusts? What is the distinction between the function of an executor and the function of a trustee? Why is it desirable that trustees should be skilled in making investments?
12. Why is a financial corporation likely to be skilled in investing funds?
13. To what extent is an executor liable for losses in buying and selling securities or other property?

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CHAPTER LVIII

COMPARISON OF INDIVIDUAL AND CORPORATE FIDUCIARIES

§ 494. Effect of Family Dissensions

Those who have had any experience in the matter of settling an estate know only too well how many times family dissensions occur, even in families where there has been good feeling until death has taken away the head. The causes for dissension are as numerous as the vagaries of the human mind. The poor executor or person charged with the duty of administering the estate is usually the victim of these family disputes. Often he is a member of the family and has a personal and pecuniary interest in the administration. As a result he is often unjustly charged with unfairness. If he is not a beneficiary, he is, being human, charged with favoritism, justly or unjustly. Most of us are more or less avaricious. We say we want what is coming to us and we want it now. The executor, whether an individual or a corporation, is entitled to a period of time varying from six to eighteen months, depending upon the jurisdiction and upon whether there has been publication for claims; but the beneficiary often does not want to wait all this time.

The executor, however, must protect himself. If he should proceed to satisfy the demands of the insistent beneficiary, he might find himself in a bad plight. He might find that the estate of which he is executor is insolvent or that at best it can pay only a portion of the legacies. If one beneficiary has received his legacy, and as a result creditors or other beneficiaries suffer, the court would surcharge the accounts of the executor

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and he would have to make up the amount out of his own pocket. When one considers how insistent some beneficiaries are and how they harass an executor, one may also realize how an executor desirous of pleasing and keeping in the good graces of the legatees might let this very thing happen, and so assume an entirely unjustified risk.

Then again, dissension arises because someone is dissatisfied with the provision made for him, because he is not the executor, or because the executor's method of handling things differs from his ideas. Whatever the cause, the result is always unpleasant and unsatisfactory. The hostility that arises between the fiduciary who is to execute the provisions of the will as trustee and the beneficiary, is often acute at a time when the trustee named in the will has died and it has become necessary to appoint a substitute trustee.

§ 495. A Typical Case

Typical of the cases that result from injudicious selection of fiduciaries, is the following: A certain man possessed of substantial means, consisting for the most part of real property, had a wife and five children. He left all his property in trust for the benefit of his wife during her lifetime, then the real property was to be sold and the proceeds divided into five equal sums, one for each of his five adult children. He appointed his wife sole executrix and trustee. She lived for a number of years, merely collecting the rents and using them herself as beneficiary.

She was inexperienced and left the actual handling of the property to her eldest son and to a confidential clerk who had been in the employ of her husband for many years. The son was unscrupulous and unskilled in business. The confidential clerk, while honest, had had but little business experience in handling real estate. By good fortune rather than as a result of wisdom, the real property was kept intact, but was allowed

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to run down. Only such repairs were made to the property as were necessary to keep it rented.

When the widow died, application was made to the court by the eldest son to be appointed sole substituted trustee. One of the five children objected, and the surrogate after hearing both sides appointed all five of the beneficiaries substituted trustees under the will. A majority of the trustees were desirous of selling the property for any price that they could obtain, irrespective of the real value. However, since in New York it is necessary to have the unanimous consent of all the trustees to sell real estate, the property could not be sold. Real estate dealers soon became aware that there was a family dispute, and believed that by waiting the property could be bought for a comparatively small amount. A beneficial lease could not be entered into, because those who wanted to sell would not consent to a long lease for fear that a sale might be lost. No substantial repairs could be made, although sorely needed.

There was constant litigation for a period of four years, and finally all income was held up for several months. The matter was continuously before the surrogate. Finally, in order to prevent their removal, the trustees agreed to put the property up at public sale. The majority organized a corporation and were able to procure a substantial sum of money to buy the property in, or to protect themselves against a sale for an inadequate price. By a small margin they were able to purchase the property themselves and turn it over to the corporation. Two out of the five beneficiaries would not enter upon this arrangement and claimed their distributive shares entirely. The three that organized the corporation are now enjoying comfortable incomes paid them in the form of dividends.

§ 496. Contrasted Administration by Bank or Trust Company

Had the testator appointed a bank or a trust company as executor or trustee, none of these difficulties would have arisen.

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The property would have been kept in order, its value would have been maintained, the public would not have been impressed with the idea of there being a family dispute, and the true value of the property could probably have been obtained at a private sale. All of the family hostilities and unpleasantness would probably have been eliminated because the bank or the trust company would have been impartial. Each question as it arose would be decided on business principles and no one member or branch of the family would be able to influence the fiduciary against the other members.

The corporate fiduciary is always willing to listen to all sides of a question in order to get full information with regard to the facts. It is willing to get the judgment of those who are familiar with the affairs of the trust or with the conditions that exist, and also to listen to the opinions of others; but having done all this, it then makes up an independent decision based upon all of the facts, uinfluenced, unbiased, and unprejudiced. An individual fiduciary, since he is human, is incapable ordinarily of acting without permitting his natural prejudices and other personal influences to come into the matter.

It has been said that the great objection to a bank or a trust company in a fiduciary capacity is that it lacks personal contact or personal interest. Experience shows that too much of the personal element often results in something other than the best judgment. The foregoing paragraphs illustrate this fact. It is not true, however, that the personal interest is entirely lacking when a bank or a trust company is in charge. If one will consider that, after all, such a fiduciary must act through its officers, that its business success depends upon pleasing those for whom it acts, that of all things the bank or the trust company is desirous of having the very people who have been the beneficiaries under one trust appoint the bank or the trust company as executor or trustee of their own wills, one cannot but believe that the bank has every reason to take

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a personal interest in the successful administration of an estate. Not only is the success of the institution itself dependent on the good-will of those for whom it acts, but the success of the officer in charge of the work of the trust department is based upon his ability to please the customers of the department, and likewise upon the successful handling of the matters entrusted to his care.

§ 497. Relation of Trustee to Beneficiaries

The fiduciary should be in confidential relations with the beneficiaries of a trust. It is the experience of officers in charge of trust departments of the various banking institutions, that the beneficiaries consult those officers with regard to many things not always within the scope of that particular trust. This often results in very friendly personal relations between the individual beneficiaries and the fiduciary, just as it would where an individual was acting as the fiduciary.

In view of the generally admitted fact that the majority of people would have greater confidence in the opinion of a bank or a trust company than in that of a private citizen, it follows that the individual beneficiary is more likely to consult with the officer in charge of the trust department in regard to his personal affairs. In all cases the transactions are between individuals. In other words, the bank or the trust company is of necessity represented by its trust officer, an individual.

Another answer to the criticism that an institution lacks personal interest in the matter is that where such personal interest is greatly to be desired, and the testator does not believe that the bank or the trust company would possess sufficient personal interest, and the extra expense does not deter, he may appoint a co-executor. For instance, he might appoint his wife or son or friend as a co-executor. Banks and trust companies often advise the appointing of a co-executor, espe-

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cially where a testator is engaged in an active business which is to be continued after his death. It is then advisable to appoint as a co-executor or trustee a responsible person familar with the particular business in which the testator was engaged during his life and which is to be continued after his death.

§ 498. A Corporate Fiduciary Will Keep Adequate Records

One of the very important and even essential duties of a fiduciary is keeping adequate records of all the transactions in connection with the administration and distribution of an estate. Probably anyone who has had any experience at all in connection with the administration of estates knows only too well how very inadequate the records that the average individual keeps would be. Lawyers have spent many hours and had much anxiety in trying to work out the accounting schedules from such records as the individual usually keeps. In one such case, which is typical of many, the executor kept whatever records he had in his check-book; in other words, he used the check-book as his journal, cash book, and ledger. There were innumerable cross-references from the stub side of the check-book to the deposit side, and vice versa. A clerk in the office of the attorney who represented the executor attempted to make up the accounting schedules. After several days' work resulting in his inability to prove the accounts, he gave it up. Finally the matter was referred to an accountant who proceeded at once to open a set of books, using the check-book as the source of information. It took considerable time to make up the books, but when that was done no difficulty was experienced in making up correct schedules for the judicial accounting.

It is well known that a bank or a trust company always makes complete, adequate, and correct records of all its transactions. The proper entries are made promptly at the time the transactions take place. The questions which are forever

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springing up as to whether an item is an administration expense or a debt of the testator, or whether the charge should be made against income or principal, are not guessed at or decided by chance. They are decided by someone who is an expert and knows how they ought to be charged.

In the case of a bank or a trust company the records are subject to numerous official examinations, including in the case of a national bank in New York, the national bank examiners, official inspectors of the federal reserve bank, the clearing house, the state bank examiners, and the examination of its own directors, and are always subject to audit and examination by its own auditing department.

Being subject to all these examinations, of which those concerned have no advance notice, the assets and affairs of every estate for which the bank may be acting would seem to be extremely well guarded. There are, however, further safeguards, namely: (1) that all entries must prove every day, and (2) that the systems used by banks and trust companies contain every known check against error or wrongdoing.

§ 499. Caring for the Assets of an Estate

One of the many considerations that should be taken into account at the time when an individual is selecting an executor or a trustee, and a fact which is seldom if ever in the testator's mind, is the question of the facilities that the proposed executor has for caring for the assets of the estate. The offhand answer that most people would give to this question, is that the executor should rent a safe-deposit box. Sometimes no safe-deposit company exists in the locality where the executor maintains his office or place of business. If, however, the executor maintains an office in a large city, of course there are a number of safe-deposit companies ready to rent boxes to fiduciaries. But in this case the securities are not in a convenient and accessible place; at least they are not so accessible

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as if the executor had them in his office at all times. A great deal of danger arises from this very situation, and there have been many cases where the fiduciary's accounts have been surcharged by reason of an alleged loss of assets of the estate because the executor lacked adequate means for safe-keeping the securities.

§ 500. Cases on Care of Funds

In one case an administrator explained a shortage by saying that his pocket had been picked and that thereby he had lost $1,000 belonging to the estate. He was compelled to reimburse the estate for the loss because the court considered that he was guilty of negligence in carrying the money around in his pocket. In some cases of loss, however, there is no negligence, and the fiduciary cannot be held personally liable.

In another case the administrator explained a discrepancy in his accounts by alleging that he had been robbed of $3,000 in cash. The facts showed that the administrator lived in the country some distance from any bank and that he had kept the money in his house until it was convenient for him to go to the county seat for the purpose of settling his accounts. He stated that on his way he was attacked by armed men and the money stolen from him. In this case the court held that there was no negligence by reason of the fact that it did not appear that the money was lost because of the administrator's failure to put the money in the bank immediately, but that the same kind of attack might have been made where there had been no such delay in bringing the money to a safe place.[1]

Sometimes executors and administrators have safes in their offices where they are in the habit of keeping securities or money. This is an unsafe place in which to keep anything of value, and there are cases where such safes have been broken

[1] Lehman v. Robertson, 84 Ala. 489.

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into and the contents stolen. In one such case the executor kept money in an iron office safe, such as is supposed to be ordinarily proof against burglary and fire. However, thieves entered the office during the absence of the proprietor and blew open the safe and stole some money belonging to an estate. In this case the court did not hold the administrator personally liable for the reason that there had been no negligence. The court thought that in view of the fact that the money had been placed in a safe the administrator had used due care.[2]

In another case the assets of an estate consisting of cash were kept in a trunk in the house of the administratrix. Sometime during the course of her administration of the estate, a thief broke into the house and the money was stolen. The court held that this was gross negligence and that the accounts of the administratrix should be surcharged.[3]

It may be said that these losses are not always honest and that in some cases the fiduciary has not been true to his trust and has used the money for his own purposes. However, there can be no doubt that there are losses of the nature described in the several cases cited.

§ 501. How a Corporate Trustee Keeps Funds

If a bank were acting in any of these various fiduciary capacities, such occurrences could scarcely happen. Most banks have very adequate facilities for taking care of the assets of an estate. They maintain vaults which are actually burglar-proof, in the construction of which every known modern device to prevent breaking into has been used. In addition, the vaults are guarded at all times of the day and night so that it is practically impossible for bank vaults to be entered. Furthermore, there is no reason of inconvenience—such as in the case of an individual whose place of business or residence is far removed

[2] Stevens v. Gage, 55 N. H. 175.
[3] Cornell v. Deck, 6 Hun. (N. Y.) 22.

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from a safe-deposit vault or a bank—why the bank should not immediately put the assets of an estate into its vaults.

§ 502. How a Corporate Fiduciary Keeps Informed as to Securities

Many times in the handling of the assets of an estate, especially where there is a trust, it is helpful to be in a position to know what is happening with regard to the corporation whose securities form the assets of the estate. In the case of a bank or a trust company acting in the fiduciary capacity, all this information is gathered through various means, including the daily newspapers and various services such as the Standard Statistics, the Red Book, and others. A careful index is maintained of all the securities held in the trust department of a bank or a trust company, so that ready reference may be had to ascertain whether the bond has been called, or the stock has conversion privileges, or rights to subscribe to stock have been issued; what the dividend rates are; what the status of bonds with respect to income tax is; and all the other innumerable questions that continually arise in handling securities. It would be unfair to expect that any individual, unless he made the handling of an estate his sole business, should have even a small part of this information, and yet every bit of it is information that should be had in order to handle the assets of an estate in the way which will produce the best results for the beneficiaries named in the will. If an individual fiduciary should try to obtain this information, even if he were willing to devote the necessary time to it, he would have to subscribe to the various services to collect this information. This would cost the estate a good deal of money because these services are very expensive. The bank or the trust company subscribes for these services but no charge is made against the estate for that, as in the case of several of the other items mentioned in another section. It is just part of the bank's overhead.

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§ 503. The Difficulty of Securing Honest Administration

If you were about to make your will and you had before you the problem of selecting a proper executor or trustee, what would be the qualification that you would consider the most important? Would it not be that of honesty? In other words, would you not demand that your executor or trustee be someone whom you believed to be so thoroughly honest that every cent of the money or property that you left would go to the persons intended by you, so far as it was in the power of your executor to bring it about? It is unfortunately too true that when one deals with individuals, one must encounter the danger due to the frailties of human beings. This is not to say that all human beings are dishonest, but one never knows what individual will fall under a given set of circumstances. "To err is human." For example, it has happened all too frequently that the testator has appointed someone in whom he had the utmost faith, who, however, actually stole the funds of an estate, or used them to his own advancement to the detriment of the estate, or speculated with them in some way and lost money that should have gone to the family of the decedent.

§ 504. Cases in Point

Many pathetic cases of this kind are on record. In a case in point, the executor of an estate was a man named Sirins. Among the assets of the estate were shares of stock in a corporation which just prior to his appointment had increased its capital stock. The estate was therefore entitled to subscribe to a certain portion of the new stock. It happened that there was a decidedly good market for the stock and therefore it was valuable, and the rights could have been sold at an advantage to the estate. Instead of doing this, he purchased in his own name the stock to which the estate was entitled and paid for some of it out of his own pocket and for some of it out of the

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funds of the estate. In this case the court held that the executor "had no right to make a profit to himself in any such way; no trustee could be allowed to make a profit out of his trust," and the court compelled him to surrender to the estate the shares he had subscribed for so that the beneficiaries gained whatever advantage there was in subscribing to the stock.[4]

In another case an absolutely dishonest and fraudulent administrator was appointed by the courts. Of course, the court at the time had no reason to believe the administrator dishonest. The facts were as follows: A certain man died leaving a widow and two infant children. At the time of his death, the testator was in the jewelry business. He had between $25,000 and $30,000 invested and was doing a prosperous business. The widow consented to the appointment of the administrator, who was a brother-in-law, and allowed him to run the business. It was not long before the brother-in-law had appropriated so much of the profits of the business that he was ready to buy it himself and set up his own business. Up to this time the brother-in-law had never been engaged in the jewelry business and in fact knew nothing of it. His previous occupation had been that of a street-car conductor. Due to the activities of a special guardian, appointed by the same surrogate's court that looked out for the interests of the infants, the wrongful acts of the administrator were detected and when a thorough investigation had been made, the court surcharged this particular administrator with the sum of $5,000.[5]

§ 505. Why a Corporate Fiduciary Cannot Be Dishonest

If you would be absolutely sure that no dishonesty enter into the handling of your estate, you should by all means appoint a bank or a trust company, as in the nature of things it

[4] Turnipseed v. Sirins, 32 S. E. Rep. 423.
[5] In re Feierabend, 38 Misc. (N. Y.) 524.

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cannot be dishonest. Its employees are all under bond. The bank's resources are available for any loss incurred through the dishonesty of its officers or employees. The funds deposited with the state superintendent of banks of the state in which the trust company or the bank has its interests, are also available to make good any loss incurred through dishonesty of the officers or employees. As a matter of record, no losses to beneficiaries of an estate have ever been incurred by reason either of the dishonesty of an employee of a trust company or the failure of a trust company or a bank. It should always be kept in mind that the funds and other assets which are in the hands of the trust department of a bank are trust funds, and therefore the general creditors of a bank in case of insolvency have no lien whatsoever upon them. As a matter of fact, the assets, such as stocks, bonds, and mortgages, can be returned to the estate in kind at any time that the trust should terminate, or if a new trustee should be appointed, the funds can be turned over to the new trustee. As to the cash which is in the hands of the trustee, while this may be used in the commercial department of the bank, yet it is safeguarded, as has already been pointed out, by the deposit of securities with the superintendent of banks, and in the case of a national bank, by the additional deposit of securities of a market value equal to the cash deposited in the commercial department. The last mentioned securities are deposited with the trust department of the bank, and trust department creditors would have the first lien thereon.

When a bank or a trust company acts as fiduciary, loss to an estate could arise only in case securities purchased in accordance with the law decreased in market value, so that upon distribution less was obtained for the investments than was paid for them. If this possibility exists when a trust company or bank is acting, how much more likely is loss to occur in this very way when an individual is the executor. Always

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remember the bank's opportunity for obtaining information as compared with the individual's.

§ 506. Summing Up the Qualifications of a Fiduciary

In conclusion, therefore, one about to make his will should take very great care in the selection of the person who is to administer his estate. He should first be sure that the individual is thoroughly honest; he should know that he is capable and has had business experience; he should be sure that he has sufficient time to spend on the work of administering the estate and that he would give it first, not secondary, attention. The testator should also bear in mind the necessity of choosing someone who would be in a position to safeguard properly the assets of the estate. The executor, in addition, should possess facilities for obtaining information with regard to investments for the estate; he should be competent and willing to maintain full records, so that at the time the accounting is to be rendered the information would be readily at hand. The executor should also be one who would act impartially and fairly, so that if there should be conflicting interests or family jealousy, he would not be swayed in favor of either party. And then, when the testator has found a person with all these qualifications, he must take into consideration the question of economy. If his estate is large, will his executors have to hire special office space and clerks in order to administer the estate?

It would appear that a trust company or a bank is the only possible executor in which all of these qualifications are present. We therefore urge that if the estate is of any size at all, the testator carefully consider the advantages which a bank or a trust company offers over the individual in fiduciary capacities. It is not believed that, if any man owning property would consider this matter in a cold-blooded business way and decide accordingly, there would be any doubt but that he would choose a trust company.

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Review Questions

1. Why are family differences likely to arise in settling an estate? Can an executor safely advance legacies? If there is dissension, what effect has it on the executor's duty?
2. What harm may an incompetent executor do? How may a dishonest executor defraud the legatees?
3. Can a corporate fiduciary be incompetent or dishonest? When a corporation is executor, with whom do legatees come in contact?
4. Why is a bank or a trust company interested in pleasing all legatees? Is it best to appoint one or more co-executors? Is there any reason against such appointment?
5. Are individuals acting as executors likely to keep careful records? Are banks and trust companies? What inspection is given banks and trust companies in your state?
6. How should an individual executor care for funds, securities, and other articles of value? How does a financial institution care for such things? What advantage has the financial institution?
7. If an executor cares for the assets of an estate as carefully as he does for his own property, will he be liable for losses?
8. How do banks and trust companies care for the assets of an estate?
9. Why do banks and trust companies keep informed as to securities? How do they do this? Why is it difficult for an individual to keep as well posted?
10. Is it easy to secure absolute honesty in individuals? Why is there an advantage in this respect in selecting a corporate fiduciary?
11. If an individual executor is dishonest, what remedy have the legatees? Does this always result in replacing the losses? Why not?
12. Why is it that trust funds practically cannot be lost if the executor is a banking institution? If a bank becomes insolvent, can its creditors reach trust funds? In what one way can trust money be lost?
13. Summarize the qualifications an executor should possess. Compare as to each the qualities of an individual and the same qualities as shown by a financial institution.

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CHAPTER LIX

CUSTODIAN, AGENT, AND DEPOSITARY

§ 507. Sundry Fiduciary Relations

Besides the many fiduciary capacities in which a bank or a trust company may act, there are other capacities of a more or less confidential relation in which individuals call upon banks and trust companies to act for them. Among these are the functions of custodian, agent, and depositary. In the following pages some of these relations will be considered.

§ 508. Banks and Trust Companies as Custodians

Banks and trust companies in many cases serve individuals as custodians. A custodian is one who has the care of something, or one who safely keeps something for another. Where a bank or a trust company acts as custodian, it keeps securities and other valuables safely for individuals, fiduciaries, corporations, and even for other banks. For the most part, what the bank really safeguards are securities, including stocks, bonds, real estate mortgages, and sometimes sealed packages that are put into the custody of the bank or the trust company. There are many advantages in this service. At the same time, it may be moderately profitable for the bank or the trust company rendering it. The fees are small, so that the person whose securities are thus safeguarded is charged but a nominal sum, usually 1/10 per cent of the par value annually, or the charge may be based on the income.

Where the services of a bank or a trust company are used in this way, the necessity of renting a safe-deposit box is entirely eliminated and expense is saved. The securities are al-

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ways available at any time upon the written instructions of the person who owns them or upon his calling personally at the bank or the trust company and requesting their delivery. He may also appoint an agent to act for him. If the agent has been properly authorized and his authority is filed with the custodians, they will honor his orders. This service is particularly valuable where the owner of the securities is a person who travels much or does not have occasion to go to the bank frequently. It is also valuable to one residing far from the bank or the market where the securities are dealt in.

One may readily realize the value of this custodian service to an administrator, executor, or trustee under a will, or to a guardian of an infant, or to a committee of a person. In such cases there are almost always securities to be cared for. The fiduciary not only has to rent a safe-deposit box, but he has the inconvenience of having to go to it whenever coupons are to be cut or bonds mature, nevertheless the duty still rests upon him to care for the securities with all the diligence of which he is capable. This means that he must cut the coupons on the day that they are actually due, or present the bonds on the day that they actually mature, and not just whenever it is convenient for him to attend to them. The safe-keeping of the securities belonging to an estate is one of the things that a fiduciary may well delegate to a bank or a trust company.

§ 509. Banks and Trust Companies as Agents

Another phase of the work of acting as custodian in a larger and more useful capacity is where the bank or the trust company acts as agent for an individual, another corporation, or another fiduciary. If the bank or trust company is the agent, it can of course do whatever is delegated to it to do, so far as the act is legal. Any person of sufficient intelligence may act as agent. A corporation as agent may do the things that an individual may do so far as it is authorized by its char-

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ter. However, it is important to know that the agent is a person of responsibility and accountability. Of course, if a bank or a trust company is appointed, there is no question as to either of these qualifications.

The matter of making the appointment is simple and requires only a letter of appointment, including in it sufficient instructions to enable the agent to act. The acceptance of the agent is also required. The appointment, however, may be by virtue of an agreement or contract. The agreement may be simple or it may be complex, depending upon whether the principal gives detailed instructions to the agent. How complex or how simple the arrangement shall be is largely dependent upon how many matters the principal wishes the agent to handle for him. The scope of the duties of an agent is practically unlimited, but from the standpoint of the kind of agency that we are discussing here, namely, agent with respect to the handling of the property of individuals, the duties are fairly well defined. Among the many cases handled by a bank or trust company as agent, the following are fair examples:

1. Banks or trust companies will safely keep securities or other personal property as they would in acting as custodian of the property.

2. They will collect all the income that may fall due within the period of their agency or any passed due income at the time that they take up their duties as agent, provided of course the money is legally collectible. In connection with the collection of income, it is fair to say that the income will be collected and credited to the individual's account exactly on the day due, and not at some convenient time, as the individual when acting for himself would be very likely to do.

3. As agent they will collect the principal on bonds when they mature.

4. They will invest and reinvest the principal from time to time, either in accordance with the instructions given by the

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principal at the time of appointment of the agent or in accordance with periodical instructions, as the principal may see fit to give them, or if the arrangement between the principal and the agent so provides, they will invest the money at their own discretion.

5. The agent will report upon the condition of investments, that is, as to the condition of the companies in which funds are invested from time to time.

6. They will obtain information in regard to called bonds, rights to convert bonds into stock, rights to subscribe to new issues of stocks or bonds, increased, reduced, and passed dividends, the reasons for the appointment of receivers in particular cases, the appointment of protective and reorganization committees, sinking funds and the payment of assessments. Of course the bank or trust company has facilities for obtaining this information much more easily than an individual would be able to do.

7. The bank or the trust company will attend to the payment of instalments on subscriptions to new issues of stock or bonds, and the transfer of stocks and registered bonds.

8. A great deal of business of this character is traceable to the fact that people in this country like to travel. Sometimes they are away for many months and they have to leave their affairs in the hands of others. There is no safer or better agent than the bank or the trust company where the individual has his account. Most of these have the facilities for attending to the various matters that the individual would want to have looked after. For example, it may be that the individual has taxes payable during the time of his absence. If he has appointed the bank or the trust company as his agent, it will make these payments and charge his account for the amount. Similarly, it may be that interest on a loan or a mortgage comes due during the period of absence and again the company, provided it is acting as agent, will pay the item and

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charge the account. The same may be said of insurance premiums, rent, storage charges, and even allowances to designees. Strict account will be kept of all of these items, so that when the person returns, the bank or the trust company can give him full information both for himself and for the purpose of making up his income tax return, which in itself is of great value and assistance to the individual.

9. They will deliver securities which they are holding in safe-keeping to brokers in accordance with whatever instructions they may have received or in accordance with the agreement which prevails between the bank or the trust company as agent and the principal. They will, of course, receive securities for the account of the principal and put them in safe-keeping.

10. They will care for real property and do everything that the principal himself could do, collecting rents, making repairs, making new leases, attending to the payment of taxes or assessments, renewing insurance, paying the premiums, and carrying on negotiations for purchase and sale of real property. From time to time, in accordance with whatever arrangements are made and in accordance with the fees that are paid for the services, the banks or the trust companies make periodical statements—monthly, quarterly, semiannually, or annually. These statements can be used as indicated above not only for the benefit of the individual himself, but also for the purpose of assisting him in making up his income tax returns, both state and federal.

§ 510. Banks and Trust Companies as Fiscal Agents

Besides acting as agent for individuals in the capacities mentioned above and in the manner indicated, a bank or a trust company may act as fiscal agent, that is, it may represent a corporation in the payment of corporate obligations, such as the interest represented by coupons attached to bonds. This

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class of work becomes a necessity when a corporation gets out an issue of bonds. Most of the bonds thus issued are known as "coupon bonds," that is to say, the interest payments are evidenced by coupons which are attached to the bonds, and are collectible upon presentation of the coupons at the office of the fiscal agent. The coupons usually fall due semiannually; sometimes, however, they fall due anually. The holder of the bonds detaches the coupon and presents it to the paying agent or fiscal agent of the corporation either personally or through his bank. The issuing corporation appoints the interest periods in the mortgage or instrument creating the bond issue. It provides the paying agent with the total amount of interest falling due at a particular time.

When the coupons are presented to the paying agent, official checks are made out to the person or his agent, such as another bank, presenting the coupons. The coupons are then canceled and held until all of the coupons of that particular date have been paid. Then they are either canceled and placed in the vault or burned, after which an incineration or cremation certificate is issued to the effect that coupons bearing certain numbers have been thus destroyed. The certificate is signed by an officer of the bank and by an officer of the corporation for whom the bank has been acting. The certificate is witnessed by at least one other employee of the bank who has seen the coupons actually destroyed. This service is an extremely important one from the standpoint of a corporation having coupon bonds.

The bank or the trust company has all the machinery to handle such matters, whereas a corporation not in the banking business would have to instal special accounting systems and to train clerks especially for the work, which would make it quite an expensive matter for the corporation, whereas when the bank handles these matters it is only part of its routine work. Instead of acting for one corporation it acts for a great many.

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There are coupons coming due throughout the year at frequent intervals, so that at no time is the bank's coupon payment department—the department that acts as fiscal agent—without considerable business. Of course, where a corporation is acting as its own fiscal agent, it would be busy only once or twice a year, depending on how often its coupons became due. Clerks would have to be taken from their regular duties and trained in this work.

The fiscal agent not only pays coupons, but pays maturing bonds as they fall due, or note issues, or any other corporate obligations. It may also pay dividends on stock, in which case it sends the checks to the various persons who are stockholders as of a certain date. This date is set by the board of directors as the day when the books shall be closed. The payment of dividends includes in general the making out of a check for the proper amount of dividend and forwarding it to the individual at the address which appears on the stockholders' ledger or upon a certified list of stockholders.

The fiscal agent work includes the filing of the government ownership certificates which the fiscal agent has received from the owners of the bonds as the coupons were presented from time to time. The filing of these ownership certificates must be done on the 20th of each month following the month in which the payment of the coupons was made, and the return is made on a special form provided by the government. At the end of the year an annual report must be made to the sorting division of the revenue office, which summarizes all of the monthly reports which have been made. The charges for this work are ordinarily ¼ per cent on the total amount of money paid on any interest period, or the deposit of the amount of money, without interest, with the fiscal agent thirty days in advance.

Where the fiscal agent is paying dividends, the fees are in accordance with the number of checks that are to be issued and

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vary in proportion with the total number; for example, if there are only one thousand checks to be sent out the charge would be proportionately higher than if there were several thousand.

§ 511. Banks and Trust Companies as Depositaries

A depositary is a person or a corporation with whom property (money, securities, or other things of value) is deposited. There is no provision of law designating who may act in this capacity, but in most instances banks and trust companies are selected for this work. The creation of the relationship may be by the actual deposit of the property, or by a letter or special agreement. Of course the duties that devolve upon the depositary vary in accordance with the arrangements made, that is, in accordance with the terms of the agreement, if there is one, or the letter of instruction, if that is the way in which the relationship has been created.

Where the relationship is that of a simple depositary, then of course the bank or the trust company would hold the property as bailee, that is, it would be responsible to the person who owned the property merely for due diligence in the care of the property, but would not be held responsible for its absolute safety. Where a bank or a trust company is acting, however, while the legal obligation is not different from that where an individual is acting, yet, because of its reputation and standing in the community, it would assume absolute responsibility.

§ 512. Depositaries Under Escrow Agreements

Where, however, the bank or the trust company is acting as depositary under an escrow agreement, there may be many and complicated conditions. Holding property under an escrow agreement means in simple language that the property is being held subject to the fulfilment of certain conditions which are set forth in the agreement. A simple example of this would be where a person had contracted to buy a piece of real prop-

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erty. Of course he would want to have an opportunity of searching the title to ascertain that he was going to get a marketable title as provided in the contract. At the same time the seller might feel that he wanted to be sure that when the purchaser was satisfied as to the title, he, the seller, would get his money. He therefore would insist that the purchase price be deposited with some disinterested person, bank, or trust company, preferably either of the latter two because of their financial responsibility. An agreement of this kind would have to provide that when the bank had been satisfied by reason of a title company's certificate that the title was in accordance with the contract, the money deposited with it be turned over to the seller. In many instances the conditions to be fulfilled are much more complicated, and the bank is called upon from time to time to watch the happening of many events.

It should be the policy of all banks and trust companies to insist that any escrow agreements be very carefully drawn with respect to defining the duties of the depositary. No bank or trust company or other depositary should be called upon to assume any responsibility other than the responsibility to turn over the property held in escrow when the specific conditions have been fulfilled. In order that there be no doubt as to when the conditions have been fulfilled, it should be clearly defined in the agreement what instrument or certificate is to prove to the depositary the fulfilment of the conditions. It should also be clearly stated what shall constitute a default and what is to be done with the property held in escrow if a default should occur.

§ 513. Depositaries Under Voting Trust Agreements

A bank or a trust company may also act as depositary under a voting trust agreement. This is an agreement entered into between the stockholders holding the majority of the outstanding stock of a corporation. It provides for the appointment

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of certain named persons, usually stockholders, as voting trustees. The agreement usually runs for a number of years. This method of handling the affairs of a corporation is adopted where it is desired to continue a definite business policy over a period of time. If the policies of a corporation are subject to the changes that are likely to occur when the directorate is changed, it is sometimes harmful to business success. By creating a voting trusteeship this danger is eliminated.

An agreement of this character provides for the deposit by its stockholders of their stock with a bank or a trust company designated in the agreement. The depositary is instructed to issue voting trust certificates or deposit receipts. These may be and are bought and sold just as the stock certificates are. The depositary keeps records of all stock certificates deposited and of all transfers of the voting trust certificates or deposit receipts and acts as the transfer agent of them.

Whenever a voting trust certificate is presented for transfer from one owner to a new owner, the stock represented by such voting trust certificate must also be transferred. If the transfer agent of the stock is a different bank or trust company, as often occurs, then the depositary must send the stock to the transfer agent and have it transferred into the name of the new owner. Then the depositary will issue new voting trust certificates to the new owner or owners. The arrangement has the same facility of transfer of title as stock certificates. The new owner without the necessity of physically signing the voting trust agreement automatically agrees to the terms thereof. In this way any change of policy is avoided without hindering any stockholder from disposing of his stock if he can find a purchaser.

§ 514. General Duties of a Depositary

Acting as depositary for bondholders' committees, reorganization committees, and the various other protective com-

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mittees which spring up the minute a corporation gets into financial difficulties, the duties of the bank or trust company are essentially merely to receive the bonds, notes, stock, or other obligations and to issue receipts therefor. The object of depositing the bonds, notes, stock, or other obligations is, of course, to put them under the control of the particular committee so that they may have the strength of many instead of the few. Again, as in the case of the voting trust certificates, these deposit receipts may be traded in if one can find a purchaser, which of course is rather difficult because of the financial condition of the corporation.

Often the duties of the depositary are much more difficult and numerous than as outlined above. Among other things, the depositary is frequently called upon to advance money to defray the expenses of the committee, in which case the depositary insists upon being given a prior lien on the particular securities deposited with it, or to take an active part in devising the reorganization plan.

If the plan is finally adopted, the depositary has the duty of carrying it out. These plans often are complicated and vary with the innumerable circumstances of the different cases. Sometimes the depositor gets back some bonds, some preferred stock, and some common stock. Then he may be called upon to pay an assessment. The holder of a first mortgage bond usually fares the best, although the holder of an equipment trust obligation or a bond issued under a mortgage on a terminal or a particular piece of property, is in an advantageous position. The holder of stock, especially common stock, usually fares the worst. He is the one most likely to be assessed.

Banks and trust companies are best able to act in any of these capacities because they are trained to the work and because of their accessibility and financial responsibility. It is not easy to see how such work could be handled otherwise than by a bank or trust company.

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Review Questions

1. What fiduciary capacities in which a financial institution may act are mentioned in this chapter?
2. What is a custodian? What kind of property do banks and trust companies take charge of? May an individual executor employ a custodian of this kind?
3. To what extent may a bank or a trust company act as an agent? What gives it this power and what limits it? What is the advantage of such an arrangement? What character of duties is delegated to banks and trust companies in this way? What kind of information will such agent secure? How are travelers served? To what extent will such an agent care for real property?
4. What is a fiscal agent? What is a paying agent? Why is a bank or a trust company peculiarly fitted for such duties?
5. What is a depositary? Does a bank or a trust company assume more responsibility than an individual bailee?
6. What is an escrow agreement? Why should escrow agreements be drawn with great care?
7. What is a voting trust agreement? What does the depositary under such agreements have to do? How is stock under such an agreement transferred?
8. What are the general duties of a depositary? If the depositary advances money, how does it protect itself? Why are the duties of a depositary sometimes very difficult?

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CHAPTER LX

A BANK OR TRUST COMPANY AS CORPORATE TRUSTEE FOR BONDHOLDERS

§ 515. Corporate Trustee

A corporate trustee is a trustee acting under an agreement between a corporation and the purchasers of its obligations. Generally speaking, the corporate trustee has the same legal obligations that any other trustee has. The obligations of the corporate trustee are defined by the instrument which creates the trust just as in the case of a personal trustee.

The corporate trustee is charged with the legal title to property of which some individual or corporation has the equitable title. The trustee does not always have the immediate custody of the property, as for example, where the corporate trustee is the trustee under a mortgage. In such case, it would hold the mortgage agreement showing that, as trustee, it had the legal title to certain property belonging to the corporation. In some cases it would have the property in its possession, where personal property such as the securities of another corporation were the subject of a trust; but if the property were equipment, such as cars or locomotives, obviously it could not have physical possession. In this case, the cars or locomotives or whatever the object of the trust might be, would have painted thereon words showing that the property was the property of the trustee. The legend would probably be somewhat as follows: "First National Bank, Trustee and Owner."

The corporate trustee must see that the terms of the agreement are carried out. It must, in certain cases explained fur-

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ther on, act for the holders of the obligations. It certifies as to the genuineness of the instruments issued under the terms of the agreement.

§ 516. Individual and Corporate Trusteeships Compared

In the early days of corporations and the issue of corporate obligations it was the custom to appoint one or more individuals as trustee or trustees. Usually one of the individuals would be a lawyer. Now, however, it very seldom happens that an individual is appointed in this capacity. At first, trust companies were appointed; since the amendment to the Federal Reserve Act both trust companies and banks may be and are appointed. Obviously either the bank or the trust company is better qualified for the position than any individual, no matter how capable. The financial standing, the impartiality, the superior training, the greater facilities, the greater accessibility, all of these and many other reasons make the bank or trust company better qualified.

§ 517. The Purpose of a Trust Agreement

The object of these various trust agreements is the same in all cases, namely: to raise money to carry on some part of the corporate business. Usually the amount desired to be raised is so large that no individual or bank would be able to lend the money, however good the security might be. On the other hand, by inducing a large number of people to participate in a loan, the problem of raising several millions of dollars becomes, in ordinary times, a comparatively simple one. As evidence of the participation of a given person in the loan, a bond or note, depending upon the agreement, is given.

Our Liberty bond issues are an excellent example of how a large sum of money can be readily raised by means of bond issues. In the case of a corporation other than a government, however, it would not be possible to raise such enormous sums.

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§ 518. The Usual Forms of Trust Agreements

The trustee is appointed by virtue of the trust agreement; all the powers exercised by the trustee are derived from this agreement; and all of the duties are fully set forth in it. There are a great variety of trust agreements. In fact it may be said that no two such agreements are alike in detail, although in a general sense there are many similarities. Some of the more commonly known classifications and titles by which different trust agreements are generally designated are: first mortgage, general mortgage, collateral mortgage, and so on *ad infinitum*.

In order to understand how the trustee acts and what its duties are, it is necessary to know what the more common of these classifications imply.

A *first mortgage bond* is a first lien on whatever property is the subject of the mortgage, such as, in the case of a railroad, the right of way. As one would readily imagine, a first mortgage means that the lien is prior to all other liens. It is, therefore, a very safe kind of investment and if the debtor corporation is even passably good, these bonds will ordinarily sell at a premium. The yield will naturally be comparatively low. Often other wording is added in the name of the bond, as, for example, "First Mortgage Gold Bonds." These additional words really add nothing to the security and are used solely as a means of attraction to the buying public. This is a case where there is something in a name.

A *refunding mortgage* is issued to take up some expiring obligation and may be good or not depending upon the soundness of the issuing corporation and the obligation which it replaces.

A *general mortgage* is usually a pretty fair kind of investment because it is a lien on all the property belonging to the corporation. However, there may be any number of liens against specific property which would be prior obligations. In

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this case, the general mortgage would probably not be an absolutely safe investment.

A *collateral mortgage* is a mortgage, the security for which would be the securities of another or the same corporation. If the securities were of the same corporation, they would, of course, be of a different issue. The securities thus pledged might be either stock or bonds. If they were bonds, the safety from an investment standpoint would ordinarily be greater.

A *debenture bond* is merely a promise to pay and is not secured by a lien on any special property. It is safer than preferred stock because it is a legal debt of the corporation, and its interest is not conditioned on profits.

An *income bond* is somewhat like a debenture in that it is a mere promise to pay, but it differs in that interest is payable only if and when earned. It, therefore, has some of the characteristics of preferred stock. Preferred stock is often cumulative, while, as a rule, income bonds are not cumulative, nor are they very desirable.

An *equipment trust* is usually in the form of a note issue. The security behind an equipment trust is, as the name implies, some part of the equipment of the corporation issuing the obligation. This kind of security is used by railroad corporations in the majority of cases, and the equipment pledged consists of the cars or locomotives. The holders of these obligations are in an advantageous position in the case of a default either on the notes themselves or on any other obligation because they can say that unless their interest is paid, they will foreclose and take the equipment. The cars or locomotives must be identified. For this reason the trustee causes the fact of his own legal ownership to be painted or stenciled on the property.

A *terminal mortgage* is a mortgage on the terminals of the railroad, if the issuing corporation happens to be a railroad.

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§ 519. The Legal Effect of Trust Agreements

It should be remembered that stock is an evidence of ownership and is never due or payable by the corporation until the corporation is dissolved. One cannot, therefore, foreclose on stock. A bond is a promise to pay at a future time, either fixed or determinable. Therefore, at some future time the corporation will have to meet its obligation. Of course, there are many more kinds of corporate obligations; but for our purposes those herein described will serve to give the reader a general idea of the subject.

The instrument by which these different kinds of issues are created and by which the trustee is appointed is known by different names. When real property is mortgaged, the instrument is called a "deed of trust." When personal property is pledged, the instrument is known as a "trust agreement." If the issue is a debenture or an income bond, the instrument is called an "indenture" or a "trust indenture." In general, however, these instruments are similar. The main object in each case is practically the same; namely, the creation of a legal relation between the corporation, the trustee, and the purchasers of the obligations. The legal obligation in each case is that the corporation agrees to pay the holder of its bonds or notes the face amount thereof at the time named therein and interest at a certain rate. The agreement also sets forth the duties of the trustee, including what the trustee is to do in the case of a default by the corporation in any of its obligations or promises. It also sets forth any provisions with regard to the creation of any sinking fund or means of retiring any of its bonds before maturity.

The instrument is an important document and a difficult one to draw. Only a lawyer familiar with corporation law should be entrusted with the work of preparing these agreements. The trust officers of banks and trust companies should familiarize themselves as fully as possible with corporate trust

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agreements in general. Where an institution is appointed a trustee under an agreement, the provisions of the particular agreement should be carefully studied so that the officers may be familiar with the duties the bank or trust company has assumed. An analysis should be made and preserved for future reference so that when a question is raised the information will be at hand.

§ 520. Investigation of the Offering

Of course, the first thing is to secure an application from the prospective customer. This having been accomplished either by solicitation or otherwise, the whole matter must be investigated very carefully, for it is the duty of every trust officer to see to it that his bank does not represent an organization whose membership is not thoroughly reputable, nor one whose only object is to unload its securities on the public. Hardly a day passes in the history of a large bank or trust company without its receiving an application to act as trustee for some concern which no institution desirous of maintaining a high reputation in the community could afford to represent. Even with the greatest care it is easy to err, either by being too lenient or by being overcautious. Of the two dangers, it is better to err by being overcautious. Each application should, therefore, be considered on its own merits. The elements which are most important are:

1. What is the personnel of the board of directors and officers and their credit standing?

2. Is the enterprise practicable? What has been the previous history of similar enterprises?

3. Are those who are to manage the enterprise skilled business men or is this their first experience?

4. Is the proposition legal?

5. What are the plans for selling the issue? Who are the brokers going to be? What equipment have they for putting

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the issue out? Are their methods approved? What is their standing?

At this time the following papers are to be filed with the institution which is asked to act as trustee:

1. A copy of the certificate of incorporation, certified to by the secretary of state where the corporation was incorporated.
2. A copy of the by-laws of the corporation, certified to by the secretary of the corporation.
3. A certified copy of the minutes of the first meeting of the stockholders, to prove that the corporation has actually commenced business.
4. A certified copy of the minutes at which the issue was authorized and the appointment as trustee was made.
5. Specimen signatures of the officers of the corporation authorized to sign the issue.
6. Certified copies of the form of bond or certificate which is to be issued.

If the certificate of incorporation or the by-laws have been amended at any time, copies of the amendments should also be filed. The agreement by which the issue is created and by which the trustee was appointed should be carefully examined, not only by the trust officers, but also by counsel for the institution.

After the trust committee of the proposed fiduciary is fully satisfied as to the soundness and desirability of the application, it is in a position to make arrangements with the applicant as to what the fees for trustees' services will be. (See § 525.)

§ 521. Examination of Property and Securities

The foregoing section outlines the preliminary work of the trust officer. After all these things have been satisfactorily

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taken care of, the trust officer is in a position to work on the trusteeship itself. First of all he should make the analysis referred to in § 520. Then he should examine the trust property to see that it agrees with the description contained in the trust agreement. Of course, if it is real property he cannot make a physical examination but he should examine the title papers. This is a part of the work on which the advice of counsel for the trustee should be sought and relied upon. The counsel will then render an opinion as to the validity of the title. If the subject matter of the trust is real property, the trust deed must at once be recorded in the proper office of the state and county where the property is located.

The next step is to examine the issue itself; this includes the comparison of the bonds or notes with the original trust agreement. Obviously, it would be impracticable to compare each bond or note with the original. Comparisons are made by picking at random about every fiftieth bond or note and comparing it with the original. Then the bonds or notes are authenticated by the trust officer and his assistants. This consists in signing the certificate usually on the back or at the foot of the bond or note. What the trustee certifies to, is that the particular certificate is genuine. The customary wording is as follows: "This is one of the bonds described in the within mentioned trust deed."

The issue is then ready for delivery. Delivery may be made *en bloc,* that is to say, the entire issue may be delivered at one time; or it may be made in instalments, whichever the issuing corporation and its bankers have agreed upon. Upon delivery either directly or through the bankers, payment should be made to the corporation whose issue it is.

§ 522. Provision for Sinking Fund

Frequently it happens that the trust agreement or deed provides for a sinking fund. This, of course, means that a

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fund is to be set aside for the purpose of redeeming the issue either at maturity or prior thereto. Where the trust instrument contains this kind of a provision the duty falls upon the trustee to see to it that the fund is set aside in accordance with such provision.

The terms of such provisions may and do vary considerably. It may be provided that a certain amount of cash be set aside each quarter, or semiannually, or annually. If the sinking fund is to be created for the purpose of redeeming the issue at maturity, then the trust instrument will most likely further provide that the trustee invest the cash; but if the sinking fund is to be used to redeem a part of the issue each year, the cash is likely to be held and lots are drawn to ascertain which bonds or notes are to be retired. Usually where bonds are called for redemption prior to maturity, they are called at a premium of one or more points.

The obvious reason for providing for a sinking fund is to add attractiveness to the issue by adding safety to it and thereby giving the issue a greater marketability. Of course, an issue with a wide and ready market is more easily sold than one with a poor market. Even if the trust agreement makes no provision for a sinking fund, sound financing demands that the corporation set aside sufficient money to redeem the issue at the maturity date. However, unless the trust agreement so provides, there is no legal obligation resting upon either the corporation or the trustee to do so.

§ 523. Trustee's Action in Case of Default

A properly drawn trust agreement always sets forth what the trustee is to do in the case of a default in any of the terms of the agreement by the corporation. In many of the agreements the trustee need do nothing until called upon by a given number of the holders of the issue, and then only if the holders of the issue indemnify the trustee. It is important from the

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standpoint of the trustee that the agreement contain a provision of this character. If this provision were omitted the trustee might find itself obligated to bring an action to foreclose a mortgage without any assurance that it would ever get back the money it would cost to conduct the suit. If the proper number of the bondholders call upon the trustee to bring an action and indemnity satisfactory to the trustee or in accordance with the trust agreement is provided, the trustee must commence an action to foreclose the mortgage in order that the property which is the subject of the trust may be sold and the proceeds used, as far as they will go, to repay the holders of the bonds or notes.

In this connection protective committees are usually appointed. These committees are made up of the holders of the larger amounts of the bonds or notes. The object of these committees is to protect the holders of the particular issue they represent. In this manner, if there is any reasonably successful chance of re-arranging the financing of the corporation which has defaulted, much money is saved, and many corporations have thus been saved for useful purposes. Much more on the subject of financing and refinancing corporations can be obtained from the many excellent works on corporate finance.

§ 524. Paying the Bondholders

A corporation, though solvent on the due date of the issue and able to pay the entire issue at that time, might at some later date become insolvent. All those who presented their bonds promptly would be paid. Those who had been slow in so doing would lose their money or at least be put to considerable trouble and probable expense if the trustee had failed to secure on the due date funds with which to pay all the bonds. As the trustee is trustee for those who are slow as well as for those who are prompt, this important duty should not be overlooked. No

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matter when the bonds may be presented after the maturity date the money should be in the hands of the trustee.

The next step after having procured from the corporation the necessary funds with which to pay the bonds, is to receive the bonds as they are presented, to examine them, and to pay them. As the bonds are paid they should be canceled. When they are all paid or a large part of them, the best practice is to incinerate them and issue a certificate setting forth that bonds bearing certain numbers have been incinerated. This certificate is made by the trustee and is witnessed by a representative of the corporation and a representative of the trustee other than the officer who has executed the incineration certificate. (See Form 22.)

After all the cash to pay the bonds has been deposited with the trustee, the trustee may return the property which was the subject of the trust. Its duties—with the exception of paying bonds the holders of which are slow in making presentation—are then complete and the trusteeship has terminated.

§ 525. The Fees Paid the Trustee

Usually the compensation of the bank or trust company for acting as trustee is divided into three classes. There is one fee for accepting the trusteeship. This is based on the size of the issue, the number of pieces, and the denominations into which the issue is divided. For a small issue of $100,000 or less than $500,000 this fee would probably be $1 a bond, assuming that the denominations were of $1,000. If they were smaller, $500 and $100, the fee ought to be about 50 cents per bond. The fee in the case of an issue of $1,000,000 and up to $10,000,000 where the bonds are in denominations of $1,000, is usually 50 cents per bond. Above this amount the rate of the fee should be proportionately lower.

Another fee would be charged for the care of the sinking fund. The amount of this fee would depend upon the amount

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of the sinking fund and on the duties of the trustee with respect thereto. The variety of possible duties of the trustee is so great that it is useless to suggest a basis for this fee. Each case must be determined separately. Usually it is a question of striking a bargain with the proposed trustee.

And lastly, another fee is frequently and properly charged upon the maturity of the issue. This fee is figured on a percentage basis, often ⅛ per cent; sometimes where the issue is small and the denominations are small, the fee will be at the rate of ¼ per cent. Another method of compensation upon the maturity of an issue is to require the corporation to deposit the principal amount of the issue thirty days in advance of the maturity date without interest. In addition to the fees that can be earned by the bank or trust company, it should be remembered that a deposit account will usually be opened with the institution by the corporation for which it is acting as trustee. The business is decidedly lucrative and in view of all the financing that is likely to be done in the near future, it can be truthfully said that the surface has as yet hardly been scratched.

Review Questions

1. What is it that determines the obligation or responsibility of a trustee? In such an arrangement, what title does the trustee hold? How is the ownership of personal property in the hands of a trustee evidenced?
2. Why are banks and trust companies better qualified to act as trustees than individuals?
3. What is the object of a trust agreement?
4. What is the instrument that creates such an agreement generally called? How are these classified? What is the function of a bond? What is a first mortgage bond? What is a debenture bond? What is an income bond?
5. What is stock? How does it differ from a bond? What is the object of a trust agreement?

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6. Where a bank or trust company is asked to serve as trustee for a concern, what are the most important questions to be considered before acceptance?
7. What papers are to be filed with the proposed trustee by the corporation that proposes the loan?
8. If the preliminary investigation has been satisfactory, what should the trustee do next? How are the separate bonds or notes compared?
9. What is a sinking fund? When should it be used?
10. What is the usual provision as to foreclosure? What is the purpose of a protective committee?
11. In paying bondholders, what happens if the corporation is solvent on due date of issue, but not at some later date?
12. What are the fees of a trustee?

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CHAPTER LXI

THE TRANSFER AGENT AND REGISTRAR

§ 526. Definition of Transfer Agent

A transfer agent is one who records the transfer of stock ownership. Stock, as has been stated, is the evidence of ownership in the assets of a corporation. Stock is not usually redeemable as bonds are, but if at any time the corporation should dissolve, then the stockholders would share in the net assets of the corporation in proportion to their holdings. In a sense they are partners in a business, but under a certain statutory form which limits the liability, and with certain other exceptions to the usual partnership agreement. The various states have different statutes setting forth the requisites for a corporation, but in all cases the ownership of the corporation is evidenced by stock certificates which are in the hands of individuals.

One of the advantages of the corporation organization is the fact that although you may buy stock today, you may sell it at any future time to someone else who wishes to be a stockholder of the corporation. You can accomplish this by selling your stock and transferring the certificate to the purchaser. It is the duty of the transfer agent to cancel the old certificate and issue a new certificate in the name of the new owner and to keep an accurate account of all transfers so made. The procedure of making the transfer can best be explained by examining the following individual case:

A is the holder of a certificate of stock made out in his name for 100 shares of the common stock of the Hollis Iron Company. He desires to sell 50 shares to B. In order that

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B's ownership may be recorded on the books of the company, A or B must present the certificate of stock to the transfer agent, with the transfer of 50 shares to B duly endorsed on the back thereof, and with an authorization to transfer 50 shares of stock to B on the books of the company. The transfer agent will then take the original certificate for 100 shares, cancel it, and issue two certificates each for 50 shares, one in the name of A and one in the name of B. Thus 50 shares of A's holdings have been transferred to B and when the proper transfer entries are made it will appear on the books of the company that instead of owning 100 shares of stock, A owns only 50 shares and B owns 50 shares. The law of most states prescribes that each company incorporated in the state shall maintain a transfer record and stock ledger. In New York, certain specified requirements must be included in the make-up of these books. For the information of the company and the ascertainment of the rights of its stockholders, it is imperative that these records be accurately kept.

§ 527. Who May Act as Transfer Agent

A corporation may act as its own transfer agent, and in the great majority of the smaller corporations, the corporation does act for itself in this capacity. The work must be accurate; it requires a set of books consisting of a transfer record and ledger to be kept. The consequence of any carelessness in the maintenance and operation of these books is likely to be serious. In other words, the handling of the stock transfers and the entering of them on the transfer books is entirely different from any of the ordinary work in which the corporate employees are regularly engaged.

When the company is of any substantial size, it is considered more satisfactory and better business practice to have a bank or other corporation act as transfer agent. However, some of the largest corporations, such as the United States

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Steel Corporation, the New York Central Railroad Company, and others, maintain their own offices for this purpose.

Banks and trust companies may legally act as transfer agents and there are companies specially organized, whose entire business is to act as transfer agents and registrars for other corporations. Any corporation which is listed on the New York Stock Exchange is required to have a bank or trust company act as its registrar. It may act as its own transfer agent but cannot act as both its own transfer agent and registrar. It is also true that one person or corporation cannot act in the joint capacities of transfer agent and registrar for corporations whose stock is listed on the New York Stock Exchange. This rule does not apply to corporations whose stock is not listed.

§ 528. The Advantages of an Outside Corporation as Transfer Agent

The duties of a transfer agent are technical and require the skill and supervision of trained officials to perform them correctly. Among the many duties of the transfer agent are some which require a knowledge of statutory provisions relating to stock transfers. All of the work is detailed and requires accuracy, as will be seen further on in this chapter. The work is of an entirely different nature from the ordinary routine business of the corporation. It is therefore advantageous to have an outside corporation perform these duties.

§ 529. Acceptance of Agency

Before a bank or trust company should accept either a transfer agency or a registrarship, careful investigation should be made as to the personnel of the corporation making the application, the credit standing of the individuals composing the personnel, their previous history, and the previous history of the corporation itself. The examination would include also

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an investigation as to whether or not the officers and directors of the corporation, or at least those charged with the active management of the corporation, have had any previous experience of the same or a similar nature.

Where the bank or trust company knows nothing about the particular business in which the corporation is to engage, it should have an opportunity to be advised through expert opinion as to the likelihood of the success of the venture. It would also want to know through what medium the stock was to be sold, that is, whether the stock would be put out by a banking or brokerage firm, and if so, the firm's standing.

In short, the investigation would be similar to, although not quite so thorough as, the investigation where a bank or trust company is asked to act as the trustee of a bond or note issue. The points to be kept most prominently in the foreground when it is necessary to make a decision as to the acceptance or rejection of an application to act as transfer agent or registrar are the integrity and honesty of the proposition and the likelihood of its being reasonably successful.

No bank or trust company would care to act for a corporation which in all likelihood would not be a successful business venture. It should also be remembered that the bank or trust company, when it lends its name to any proposition, takes a certain amount of moral responsibility, even though it does not assume any legal responsibility.

As in the case of a trusteeship, the bank or trust company about to act as transfer agent or registrar must require that certain papers be filed with it. They are:

1. Resolutions of the board of directors, appointing the bank.
2. Copy of the certificate of incorporation, certified to by the secretary of state of the state in which the corporation was incorporated.

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3. Any amendments thereto, certified by the secretary of state.
4. Copy of the by-laws, certified by the secretary of the corporation.
5. Copy of any amendments thereto, certified by the secretary of the corporation.
6. Copy of the minutes of the first meetings of the stockholders and directors, certified by the secretary of the corporation.
7. Specimen copy of the stock certificates to be used, certified by the secretary of the corporation.
8. Formal signatures of the officers of the corporation authorized to sign the stock certificates.
9. Either a certified list of the stockholders of the corporation existing at the time the transfer agency is turned over to the bank or trust company, or stock ledgers and transfer records proved to the date of transferring the records to the bank or trust company. If the corporation is just being organized, of course, these latter items would not be in existence.

§ 530. Duties of the Transfer Agent

After all of the requirements above mentioned have been fulfilled, the bank or trust company is ready to begin its duties as transfer agent or registrar. The new stock certificate books, properly signed by the officers of the corporation, should be turned over to the transfer agent. The stock certificates should be examined and compared with the certified copy filed with the transfer agent to see that they are in all respects alike. The transfer agent then opens the following books: (1) the stock ledger, and (2) the transfer record.

If the corporation is a new one and has not issued any stock, the first duty of the transfer agent will be to receive subscriptions for stock and to issue certificates to those who have

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subscribed. Where subscriptions are paid in instalments, temporary or interim receipts are issued to the subscriber until the final payment has been made.

It is customary for the corporation for whom the bank or trust company is acting, to establish a deposit account with the bank or trust company. If this is done the transfer division, which is usually conducted as a part of the trust department, will credit the account for the sums received as subscriptions to stock. If, however, the corporation does not make the bank its depositary, the transfer division will turn the money over to the corporation from time to time.

At this point it should be mentioned that in accordance with statutory requirements in most of the states, the trust department of a bank must not hold funds subject to a draft or check. In Michigan, no trust company is allowed to maintain any checking account on behalf of customers. In other states, however, there may be a commercial department of the trust company in which checking accounts are maintained. Therefore, the transfer division must be careful that it in no way violates the statutes of the state in which it is incorporated and its office is located, by directly or indirectly establishing an account with a corporation on which it can draw. If the corporation has not opened a deposit account with the bank or trust company, the proceeds of subscriptions should be turned over to the corporation directly and not by honoring its drafts.

§ 531. Entries in the Transfer Record

Upon issuing new certificates, a complete record is made in the transfer record of all stock certificates issued, the amount of stock represented by each certificate, and the name and address of each individual stockholder. The stock certificates are listed in numerical order in this transfer record. The transfer record, therefore, is really a book of original entry and

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corresponds to a journal of an ordinary commercial accounting system.

The stock ledger is posted from these books. As in any other ledgers, accounts are kept with the individual stockholders. Ordinarily, they appear in the book in alphabetical order.

At the time when the stock is issued it should be remembered that the Federal Tax Law requires that revenue stamps (documentary) be attached to the stubs of the stock certificates, at the rate of 5 cents for each certificate of $100 par value or fractional part thereof. If, however, the stock is of no par value, the tax is at the rate of 5 cents for each share, unless the market value exceeds $100 per share, in which case the tax is based on the market price, so that stock of no par value, the market value of which is $150, would be taxed 15 cents for two shares. In New York there is no state tax on an original issue of stock.

As soon as the issue has been put out, transfers of the stock are likely to commence, depending upon the marketability of the issue and particularly upon its speculative features. The more speculative the stock may be, the more sales there will be and therefore the more transfers.

The actual method of the transfer has been explained. There are, however, certain rules for making good transfers, which must be observed and insisted upon by the transfer agent. Where stock is transferred from one living person to another, the transferor must sign the certificate at the foot of the assignment printed on the back of the certificate. His signature must be known to the transfer agent or if it is not known, as is generally the case, it must be guaranteed by another bank or trust company or, in New York City, by a member of the New York Stock Exchange. In other localities, the guaranty of a member of the board of trade or exchange which is similar to the New York Stock Exchange may be

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accepted as sufficient guaranty. Most New York banks and trust companies will not accept the guaranty of a curb broker. The reason for the insistence upon a guaranty by a bank or trust company, or a member of a stock exchange firm, is that the guaranty should be by a corporation, firm, or individual whose reputation is known.

The transferor also must place on the certificate or on a memorandum sale of the stock, the transfer tax stamps required by statute. There is a provision of the Federal Tax Law providing that revenue stamps (stock transfer) at the rate of 2 cents per $100 par value be attached to the stock. If the stock, however, is of no par value, the same rule as in the case of original issue stock applies, except that the rate is 2 cents instead of 5 cents. In New York State there is a statute requiring that all transfers of stock shall be taxed at the rate of 2 cents per $100 par value, the same rate as provided by the federal law. This tax is also a stamp tax. In some other states there are stamp tax laws to be observed.

§ 532. Transfer of Stock Belonging to an Estate

The ordinary transfer of stock between living people is fairly simple. The real technicalities arise, however, where stock belonging to the estate of a decedent is transferred from the name of the decedent. Technicalities arise when the transfer is made from either the executor of the decedent to an individual or directly from the name of the decedent to an individual who may be a beneficiary of an estate or the next of kin of the decedent.

Proof of Death. It is quite obvious that, if the stock certificate is to be endorsed by someone other than the person in whose name the stock appears, there must be an explanation showing the authority of the person who endorses the certificate as personal representative. The form of proof most universally recognized in the case of stock in the name of a

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decedent is a certificate of the probate court showing that the person who has endorsed the certificate has been appointed executor or administrator. Sometimes a death certificate of the Bureau of Vital Statistics may be required.

Waiver of Notice from State Comptroller. In practically every state of the United States there are transfer tax laws also known as inheritance tax laws. These laws impose a tax on the property of decedents. In some of the states the laws do not affect direct descendants at all. In these cases the tax is imposed only against collateral relatives. In other states there is an exemption of varying sums to those who are direct descendants. In order to transfer stock of a decedent where there is any transfer tax law, it is necessary to obtain a waiver from the state comptroller or similar official. The effect of this waiver is to permit the transfer agent to make the transfer without giving further notice to the comptroller or similar official. In New York a transfer agent or any other person who makes a transfer of any kind of property which belonged to a decedent without obtaining a waiver, is subject to a penalty of not less than $5,000 nor more than $25,000, in addition to a liability for the tax upon the property transferred.

Certified Copy of Will. If the owner of the stock died leaving a will, then the transfer agent should require that a certified copy of the will be filed with it. Sometimes a plain copy may be filed, but the certified copy then should be exhibited to the transfer agent and an opportunity given to compare the plain copy with the certified copy.

Proof of No Debt. If the transfer is made within a year from the date of the death of the decedent, an affidavit should be made by the executor and filed with the transfer agent, alleging that the debts of the decedent have all been paid or amply provided for.

Other Papers to Be Filed. The Federal Estate Tax Law, which of course covers the entire United States, provides that

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any estate of $50,000 or upwards is liable to a tax. In order to check up the transfers of property in estates of decedents, a provision of this law requires that a 60-day notice must be given to the collector of internal revenue. The 60 days start to run from the date of the qualification of the personal representative who is executor or administrator. Therefore, when a transfer agent is requested to transfer stock, it should know that the 60-day notice above referred to has been properly filed with the collector of internal revenue for the district in which the estate is located. The kind of proof that the transfer agent should require is not set forth in any law, but an affidavit made by the executor or a certified copy of the notice with the acknowledgment of its receipt, endorsed by the collector of internal revenue of the district, or an acknowledgment from the collector of internal revenue that such a notice has been filed, are a few of the kinds of proof that the transfer agent may properly require.

Requirements If Corporation Is Foreign. If the corporation whose stock is sought to be transferred was incorporated in a state other than the state where the transfer agent has its office, then a waiver must be obtained from the state where the corporation was incorporated. If the decedent died a resident of one state, the transfer agent is in another state, and the corporation was incorporated in a third state, then three separate waivers will be required. It must be borne in mind, however, that in all of the states, the transfer tax laws, sometimes called "inheritance tax laws," differ; and in some few states there is no inheritance tax, and in others the tax is only against collateral descendants of the decedent. These facts must be taken into consideration at the time of making the transfer. Therefore, it is always well for the transfer agent to have accessible the law with respect to the inheritance or transfer tax in the various states.

Endorsement of Executor. The stock certificate in the

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case of a decedent will of course be endorsed by the executor or administrator on behalf of the decedent. Where stock belonging to an estate is sought to be transferred into the name of an individual not the executor or administrator, and someone not designated as a beneficiary under the will, it may, in certain of these cases, be necessary to obtain a certified copy of a decree of the surrogate's or probate court, directing the transfer of the stock to the individual. A case like this might arise where the estate was of insufficient value to meet all the debts of the decedent. It would, of course, in such a situation, be necessary to sell some or all of the assets of the estate, irrespective of the fact that some of the assets might be specifically bequeathed. The transfer agent would have a certified copy of the will filed with it, showing that certain stock was specifically bequeathed to an individual other than the one to whom it is sought to transfer this same certificate of stock. In order to justify such a transfer, it would, as stated above, be necessary to have a decree of the surrogate's or probate court. This decree should be filed with the transfer agent.

It would also be necessary to have such a decree where the stock was to be transferred out of the estate to someone other than a beneficiary, or even if it were to a beneficiary other than a specific legatee. If the transfer is made first to the executor or administrator, then he takes the responsibility for a transfer out of the estate, but the transfer is attempted to be made directly from the name of the decedent to another party, then the rules above mentioned apply. An example of a specific legacy of stock would be as follows:

A will provides that Certificate No. 889 of the Jones and Brown Iron Works Company, Inc., be bequeathed to Richard Roe. In a case like the above it is not necessary to obtain a decree of the court. A certified copy of the will will be sufficient authority to the transfer agent to make the transfer directly to Richard Roe.

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§ 533. Lists of Stockholders for Dividend Payments

Among the duties of a transfer agent, there is, as has been stated, the maintenance of stockholders ledgers and transfer records. One of the reasons for maintaining these records is to have a list of stockholders with their addresses and amounts of their respective holdings, when the corporation is in a position to declare a dividend. The transfer agent at that time would be called upon to supply the corporation for which it is acting, with a certified list of stockholders, their addresses, and the respective amounts of stock held by each stockholder. The transfer agent may, of course, be called upon for a stockholders list at other times than dividend periods. Such occasions arise when the corporation wishes to send out notices of any kind, including increase of capitalization and rights to subscribe to stock, and the like. When a corporation is about to pay a dividend, a meeting of directors, of course, is held and the rate of dividend is declared and the time of payment is set, and it is decided to whom it shall be paid. The way this is done is to have the resolution declaring the dividend read that the dividend is payable to stockholders of record as of a given date. Often the resolution will declare the books to be closed as of a given date, and will set a time for reopening the books after the dividend has been paid. If the books are declared to be closed, then no transfers may be permitted during the time that they are closed. The certified list of stockholders in either case must be made up as of the date specified in the resolution.

§ 534. Definition of Registrar

The registrar is one who registers something, in this case securities of some kind, usually either stock, bonds, or notes, and sometimes commercial paper. The New York Stock Exchange rule requires that the registrar shall be a bank or trust company. If the stock is not listed, however, no rule exists

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as to who the registrar shall be. Some corporations act as their own registrar as well as their own transfer agent, while other corporations have their transfer agency and registration work handled by one bank or trust company. The better practice, however, is to have the registration handled by a bank or trust company other than the organization acting as transfer agent.

§ 535. Duties of the Registrar

The duties of the registrar are much less complicated than those of the transfer agent. It is his duty to see that the corporation does not overissue stock, that is, that it does not issue more than the stock authorized by the board of directors under the charter limitations. In addition to this, the registrar must receive and examine the certificates to see that they are genuine. He will record registrations in a book kept for that purpose and then deliver the certificates to the transfer agent.

Of course before accepting the appointment as registrar, a bank or trust company which cares to maintain a high-class reputation will make an investigation similar to and as drastic as that which it would make were it going to act as transfer agent. In fact it may be said that in all cases no bank or trust company will act on behalf of another corporation or individual unless it is satisfied of the standing of the corporation or individual.

§ 536. Fees

The fees for acting in the capacities of transfer agent and registrar differ in different localities. No set rules can be laid down as to charges which may be made, although certain fees have been recommended as proper by the American Institute of Banking.

In addition to the fees that can be made for services, a

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transfer agency frequently carries with it a deposit account which is, of course, valuable and adds to the attractiveness of the business.

Review Questions

1. What are the duties of a transfer agent? What is the procedure when shares of stock are sold? What are the books kept by a transfer agent?
2. Why do small corporations not require a transfer agent? Why do the largest corporations maintain their own transfer offices?
3. What are the reasons for employing banks and trust companies as transfer agents?
4. Why do banks and trust companies investigate carefully before accepting a transfer agency or registrarship? What papers are filed before a bank acts as transfer agent for a corporation?
5. Who has charge of the book of stock certificates? What is the first duty of the transfer agent? What does the transfer agent do with funds as received? Can the trust department hold funds subject to check?
6. What is the transfer agent's book of original entry? To what books are these entries posted? What is the federal tax on original issues of stocks on transfer? What tax laws has your state as to original issues and transfers? How is the signature of the transferor proved?
7. When stock belonging to an estate is to be transferred, what must the transfer agent require to make the transfer safe? When is it necessary to have a waiver of notice from the state comptroller? Why does a transfer agent want to be sure that the 60-day notice has been filed with the collector of internal revenue for the district? If the corporation whose stock is to be transferred was incorporated in another state, what caution is necessary? Why should the transfer agent have laws of all the states accessible? Who signs the certificates belonging to an estate? When is a decree of the court of probate needed? In case of a specific legacy of stock, what is needed?
8. When are lists of stockholders required? What fixes the date of a dividend?

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9. What is the function of the registrar of stock? What do the rules of the New York Stock Exchange require?
10. What is the object of having a registrar of stock? Does a bank exercise caution as to undertaking the registrarship of a corporation?
11. What are the usual fees charged in your locality for services as transfer agent and registrar?

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CHAPTER LXII

ORGANIZATION OF A TRUST DEPARTMENT OF A BANK OR TRUST COMPANY

§ 537. Divisions of a Trust Department

It is well in connection with the work of this or any other department of a bank or trust company, to have the functions performed by the department laid out on a chart, and to follow the divisions of the work thus laid out as closely as possible. A typical trust department would include the following divisions:

1. Corporate trust division
2. Reorganization division
3. Personnel division
4. Transfer and registration division.
5. Fiscal agent division
6. Personal trust division
7. Custodies and safe-keeping division
8. Accounting division
9. Bond and mortgage division
10. Real estate division

These in turn will be divided in accordance with the work to be done in each particular division, but this will be more clearly shown in the accompanying charts and those shown in Form 25. There will be one or more officers in charge of the work, depending on the size of the bank and the volume of business transacted. If business is transacted with all of the different divisions shown in the chart, it will be necessary to

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have one officer in charge and two or three assistants to handle the work in each division.

The chart here shown is of a moderate sized trust department, outlined as far as executives are concerned. (The complete charts of a bank organization will be found under Form

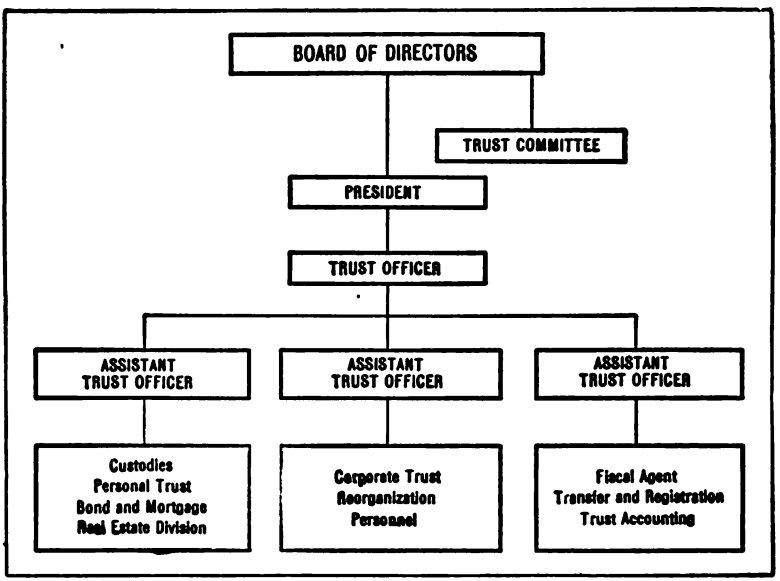

Chart 1. Organization of a Trust Department
See also Form 25.

25.) In this case there is a trust officer in charge of the entire department, and three assistant trust officers.

One has the custodies division, personal trust division, bond and mortgage division, and real estate division under his supervision.

Another has the corporate trust division, reorganization division, and personnel division.

The other has the fiscal agent division, transfer and registration division, and trust accounting division under his supervision.

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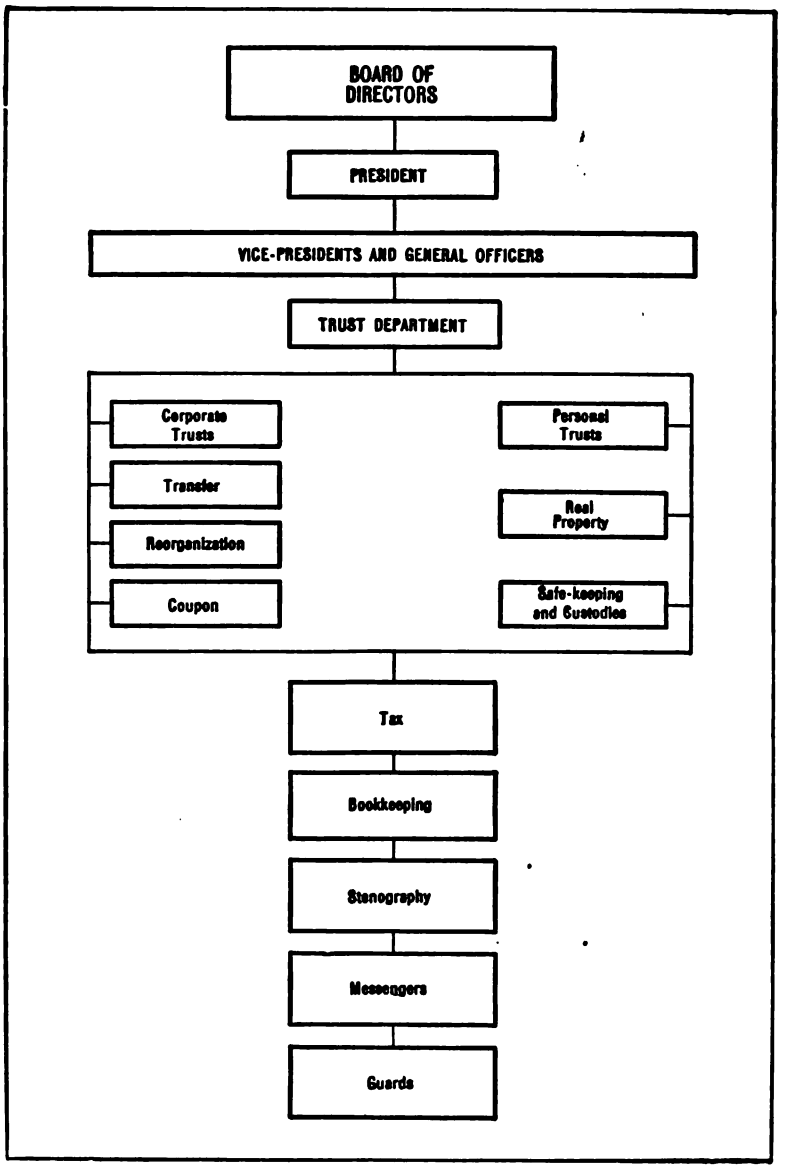

Chart 2. Departments of a Trust Division
See also Form 25.

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Of course, any other arrangement, as long as it was fairly definite, would probably work out just as well.

§ 538. The Trust Committee

The trust committee is composed of members of the board of directors of the bank or trust company. They are chosen by reason of their particular qualifications for this kind of work. The members of the trust committee should be successful business men whose judgment, as proved in their particular line of business, has been good. It is best to have men versed in different kinds of business, so that when any question is placed before them there is someone experienced along the particular line who can render an intelligent decision. One of the chief functions of the committee is to pass upon investments made by the trust department for estates for which the bank or trust company is acting as a fiduciary. The committee has nothing to do with the details relating to the conduct of the department. In some companies it passes upon the acceptance of business, but not in all.

§ 539. Duties of the Trust Officer

The trust officer is responsible for the conduct of the entire department. He must be ready to interview customers and to advise on the different kinds of business transacted by the department. He should delegate certain work, as indicated in the chart, to his assistants, who in turn will be responsible to him for the work of these particular divisions with which they are charged. The trust officer should avoid, as much as possible, attending to the details, leaving these to his subordinates.

It has been found well worth while for the trust officer to hold conferences with his assistants at stated times. In some cases where the volume of business is great, a conference takes place every morning; in other cases, once a week. Of course, all matters before they are accepted should be referred to the

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trust officer. If necessary he will in turn refer them to the president of the bank and to the trust committee for final decision.

The trust officer should be consulted in reference to all matters of publicity, not only as to the general policy but as to the actual material used, for the reason that he is presumed to have an expert knowledge of the services performed by this department; and should be qualified to pass on the expediency and value of any statements given to the public.

§ 540. The Duties of the Assistant Trust Officers

The assistant trust officers have the supervision of particular divisions of the trust department, as shown in the chart. Each assistant trust officer must, therefore, attend to the details of his department through his clerical force.

Generally, there is one assistant trust officer who has charge of the personnel of the entire department, whose duty it is to study the clerical force, noting their capacities and deficiencies, correcting the latter, and fitting the different clerks into the work to which they are best suited. The number of people employed in the trust department of a bank will, of course, depend upon the volume of business handled. It is well whenever possible to divide the work of the department so that a particular clerk will handle chiefly one kind of work, so that the greater expertness may be acquired and the responsibility for efficient work placed on particular individuals. Careful study of the charts given in this chapter will give an adequate idea of a typical trust department of a bank or trust company.

Review Questions

1. What are the usual divisions of a trust department? What is the purpose of the various divisions?

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2. Who compose the trust committee? What is its function? How should its members be chosen?
3. What are the duties of the trust officer? Why should he have frequent conferences with his assistants?
4. What are the duties of the assistant trust officers? What are the advantages of a division of labor in the trust department?

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CHAPTER LXIII

THE RELATION OF THE LEGAL PROFESSION TO A BANK OR TRUST COMPANY ACTING IN A FIDUCIARY CAPACITY

§ 541. The Advice of Counsel

Every bank or trust company will find that it will need the advice and counsel of first-class attorneys. If the bank or trust company maintains a trust department, the advice of an attorney will be the more needed and the more important because of the fact that almost everything that is transacted in a trust department is technical and comes clearly within the provisions of some statute or law. It is, therefore, advisable that a bank or trust company at its inception select a counsel whose experience has been such that he can give adequate information in regard to general banking provisions—particularly in regard to the management and handling of estates and corporate matters. The relation between the bank's counsel and the bank should, of course, be extremely cordial and close, as in fact the relation between any client and his attorney should be.

§ 542. Friction Between Trust Companies and the Legal Profession

A serious conflict of interest has arisen between financial institutions maintaining trust departments and the legal profession. It is too true that in the not distant past, and even at the present time, the execution by these institutions of certain work that is properly the prerogative of the legal profession has caused the members of the bar to feel some antagonism to banks and trust companies. Therefore, maintenance of friendly

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relations between banks and trust companies and the legal profession is a growing problem, made more difficult by the attitude of some of these financial institutions. It is a problem that is extremely important to both parties. The solution would not be difficult if both the financial institutions and the legal profession would recognize certain fundamental principles and act accordingly.

The profession of the law is one of the oldest and one of the most honorable of any of the more intellectual vocations into which men have entered. From the beginning of civilization, which means from the time when men lived in a society that recognized the rights of others, there have been laws and lawyers to assist in the enforcement and administration of the laws so recognized.

§ 543. Requirements for Admission to the Bar

In order to become a member of the bar a certain amount of preparation in the way of study is required in every state of the Union. One must satisfy a board of examiners that the mental attainments of the particular individual show that he is capable of practicing law. Having satisfied such a board as to his intellectual qualifications and ability to advise others with respect to their legal rights, the applicant for admission to the bar must then satisfy a character committee as to his moral qualifications. Save the medical profession, few lines of professional endeavor require as severe tests as those that are set for the man who desires to enter the legal profession.

After the authorities have been satisfied as to both the mental ability and the moral character of the applicant for admission to the bar, he must take oath that he will support the constitution of the United States and the constitution of the state in which he is admitted. Having been admitted, he becomes an officer of the court and is responsible to it for his conduct. He may be censured by the court for any misconduct,

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or the court may revoke his license, either temporarily or permanently, depending upon how serious the offense of which he is guilty may be. Every state has a statute on its books making communications between client and attorney confidential, so that such communications are absolutely inviolate and may not be revealed by the lawyer except with the full consent and knowledge of the client himself. The attorney stands in a unique position, different entirely from that of any other individual or class of individuals. An attorney must be trained in the law, experienced in the interpretation of the law, familiar with the technical language used in legal documents, and accustomed to studying the decisions of courts and applying them to the particular case before him.

§ 544. Duties of a Lawyer in Preparing a Will

In order properly to advise a client or to prepare a legal document, all of the foregoing valuable qualifications are necessary. Take, for example, the preparation of a will as set forth in the earlier chapters of this work. This act, in that the testator thereby seeks to dispose of property which he has worked a lifetime to accumulate, in such a way as will best protect and provide for his family and survivors, is of the utmost seriousness and importance. A will is almost a sacred document in that it is the last expression of the wishes of the person who, when the will becomes effective, will have passed out of this world, yet it frequently happens that a testator will prepare his own will, or take the advice of some unskilled friend. This sometimes results in some very peculiar, even ludicrous wills, one of which is as follows:

> GILBOA, Feb. 20, 1883.
>
> I, George P. Ashmore, of the town of Gilboa County of Schoharies and State of New York, do hereby in this my last will and testament, give and bequeath to my daughter Ruth Ashmore, my only lawful heir, all my real and per-

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sonal estate to be used according to her best knowledge and ability both for her support and comfort and benevolent purposes, so long as she needs it.

I give and bequeath to the Board of Foreign Missions of the Reformed Church in America Five Hundred Dollars for the support of Missions and Missionaries to be paid in one sum or one-hundred-dollar payments, as Providence appears to direct, before my decease if thought best.

I give and bequeath to the Board of Education of the Reformed Church in America enough to endow or found a scholarship, the annual interest to be used to educate and qualify needy pious young men for the Ministry, to be paid before my or Mary's death if thought best, after the expenses are all paid, all the remainder of my estate to be equally divided between the Foreign and Domestic Missionary Boards of the Reformed Church in America for the support of Missions and Missionaries.

I appoint John C. Haynes for sole executor.

(Signed) GEORGE P. ASHMORE, *Testator*

H. M. HAYNES
R. D. CARR *Witnesses.*

P. S. The five hundred dollars given by the second bequest in said will was paid by the testator during his lifetime in one-hundred-dollar payments.

Read the will set forth above again, try to interpret or construe it. When this will was probated the resulting litigation dissipated a large part of a moderate sized estate. For two years the matter was before the courts, and the final construction was unsatisfactory to all parties. This is typical of what happens when a man makes his own will, and the reason why lawyers are said to approve such amateur efforts.

When a corporation or an individual who is not a lawyer presumes to advise anyone as to his legal rights or to assist him in the preparation of a legal document, it or he is not responsible; and even if his advice is wrong, or causes loss or injury to others, or is even immoral, no one can be held.

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§ 545. Why a Bank or Trust Company Should Not Do Legal Work

No bank or trust company should set itself up as an advisor in any legal matters. It is not and cannot be admitted to the bar, and it is not trained and cannot be trained in the law. Though it may employ a lawyer and gain his services for customers, the attorney is responsible only to the corporation which employs him. In fact, it would be unethical for the attorney to give advice to customers of the bank or trust company, because of the fact that he does not owe the paramount obligation to the person seeking the advice, but to his employer. One of the fundamental ethical principles of the legal profession is that an attorney must not represent a client unless he can recognize a paramount obligation to serve his client. When an attorney is employed by an institution, he cannot recognize a paramount obligation to serve a customer of the bank or trust company should the interests of the customer and of the institution conflict.

There are trust companies and banks which advertise that they will prepare wills for customers who will in turn designate the bank or trust company as executor or trustee, or both Their method of procedure when an individual comes in response to the advertisement, is to call in the counsel employed by the bank to discuss the preparation of the will with the individual. He is necessarily advised that the bank or trust company should be appointed executor or trustee, or both. The attorney owes his first obligation to his employer, namely, the bank or trust company. It might well be that in a particular case this advice would not be proper, and at all events the attorney is handicapped in that his paramount obligation, which should be to the client whose will he is drawing, cannot be so because of the fact that he is not his client at the time, but a customer of the bank.

In New York these facts are recognized and a statute is

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on the books which prohibits corporations from practicing law. Decisions have been rendered under this statute which have strongly supported it. In a case under this statute the court held that the preparation of a will by an attorney employed by the trust company was practicing law within the meaning of the statute and was in violation thereof.[1] Although it may not as yet be a statutory offense in other states for corporations to practice law, and especially for banks or trust companies to prepare wills, yet it is as unethical and ill-advised in one place as it is in another, and it is not too much to say that no bank or trust company should, under any circumstances, indulge in the practice.

§ 546. What a Lawyer May Advise

In other chapters of this work we have endeavored to point out in fair and reasonable ways, the advantages of the appointment of a bank or trust company in a fiduciary capacity over the appointment of an individual. It is believed that attorneys should recognize this fact and that they should advise their clients in the interest of the clients and not necessarily in their own. There is no doubt that the tendency would be for some attorneys to advise their clients not to appoint a bank or trust company, because by so doing they feel that they will lose the employment of probating the will and administering the estate when the time arrives. This, however, should not be a moving force affecting in any way the advice which the attorney gives his client. Furthermore, it is not necessarily true that the attorney who prepares the instrument will not have the work of probating the will and administering the estate. This matter is discussed in §§ 185, 191.

§ 547. How Far a Bank or Trust Company May Go

From the standpoint of ethics it is not well for banks and trust companies to attempt to advise customers with regard

[1] People v. People's Trust Co., 180 App. Div. (N. Y.) 494.

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to their legal rights. This does not, of course, mean that a bank or trust company officer should not discuss with a customer certain practical provisions that he may want to make in his will, nor does it mean that the officer of a bank or trust company should hesitate to discuss the general proposition of the appointment of the bank or trust company in a fiduciary capacity. When, however, the proposition is put before the bank or trust company officers to prepare a will, they should refuse to do so and should tell the customer that the proper person to prepare the will is the customer's own counsel, or at least counsel of his own choosing. If more than this is done, the institution assumes a liability and a certain responsibility which is unnecessary and which it is well to avoid.

Aside from the question of ethics it is well to consider what is to be gained by making friends of members of the legal profession. A great deal of the business that comes to a bank or trust company, particularly in its trust department, comes through attorneys. A broad-minded, well-trained attorney will almost certainly advise his client to appoint a bank or trust company in any fiduciary capacities in preference to an individual; or if there is some reason why an individual should be appointed, he will advise that an institution be appointed co-executor or co-trustee, along with the individual. Moreover, the attorney will select the depositary for funds of an estate for which he is executor or administrator. Naturally he will choose the bank or trust company towards which he feels a friendly interest, everything else being equal.

§ 548. The Attorney for the Estate

Another phase of this question arises when a person, having named the bank or trust company as his executor or trustee, dies and the will is to be offered for probate. There are many institutions in all sections of the country which insist, as is

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their right to do, upon retaining the bank's own counsel to probate the will and administer the estate. The justification for doing this is that the executor and trustee, whether it be a bank or trust company or an individual, must assume the responsibility for the work. With the responsibility, of course, must go the right to select the medium through which the acts shall be performed.

In making the selection, however, there are conditions to be taken into account which are too often overlooked. If A, an individual, has employed a certain attorney to prepare his will, and if the attorney is a man of high standing in his profession, both as to learning and as to character, and if the attorney had for many years been familiar with the affairs of the testator, it is usually true that the attorney will handle the legal matters pertaining to the administration of the estate of the decedent better than would the attorneys for the bank or trust company, no matter how eminent those particular attorneys might be. In other words, there should be no hard and fast rule that under all and any circumstances the bank's attorneys should be the attorney for the estate. It might be that the attorneys for the bank or trust company were engaged in some litigation in which the interests were antagonistic to that of the estate of which the bank or trust company is the executor or trustee. In such a case there could, of course, be no question that the bank's counsel should not be retained to advise it with regard to that particular estate. Then, again, it must be remembered that if the testator had confidence in the attorney whom he employed, there is reason for the bank or trust company to be willing to allow the attorney to represent it in the administration of the estate in question.

It is eminently fair that a reputable attorney should be retained. He worked hard to get the good-will of the client and he does not want to lose the opportunity of representing the

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client's estate when the client dies. It must always be remembered that if a bank or trust company refuses to permit the attorney to act it is taking away business from the attorney; and when one takes away business from another, friendly relations, to say the least, are not established. Attorneys are just as human as men in other walks of life and they react to the attitude of the bank or trust company in the same manner that other men would. Good business policy, therefore, seems to dictate that as much latitude in retaining counsel in the work of administering estates be allowed as is consistent with the responsibility that the bank or trust company assumes. If it would be perfectly safe to permit the attorney who represented the decedent in his lifetime to represent the bank or trust company in the administration of his estate, he should be allowed to do so.

Considerable agitation has been set on foot by attorneys to restrict the activities of banks or trust companies in getting fiduciary business, the motive of which probably lies in the fact that a certain amount of business is being taken from attorneys. If, by a liberal attitude on the part of banks or trust companies, this attempt to get adverse legislation can be discouraged, that is much to be desired.

In conclusion it may be said that:

1. It is absolutely improper for any corporation, and especially a bank or trust company, to do anything which can be considered practicing law. In observing this rule it is better to err on the side of conservatism than otherwise. The consequences in some states are serious; in all, it is unethical.

2. The counsel who are regularly retained by the bank or trust company may not be able to handle certain fiduciary matters as satisfactorily as the attorney who usually represented the testator or the creator of the trust.

3. A large proportion of the business is derived from the lawyers and consequently their good-will is valuable.

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4. Adverse legislation is the all too likely result of methods considered reprehensible by the various bar associations, which are always trying to improve the administration of justice.

Review Questions

1. Why is the advice of counsel essential to a fiduciary corporation?
2. What has caused some friction between trust companies and lawyers as a class?
3. What are the requirements for admission to the bar?
4. Why is it difficult to make a will?
5. Why are fiduciary corporations disqualified for such work? What is the procedure when a customer employs them to make a will? To whom does a lawyer, under such circumstances, owe the higher obligation?
6. What conflict of interest arises at times in the preparation of a will?
7. To what extent can a fiduciary corporation go in advising customers in legal matters? Why is it desirable that lawyers and bankers should be on friendly terms?
8. Where a fiduciary corporation is acting, should it use its own counsel? Why? Is the rule unvarying?

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PART VI

ACCOUNTING FOR ESTATES OF DECEDENTS

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CHAPTER LXIV

PURPOSE AND THEORY OF ESTATE ACCOUNTING

§ 549. Purpose of Estate Accounting

> The executors have to account for the estate of the testator come to their hands, or to the hands of any other persons by their order, or for their use, and to show that they have dealt with the whole in due course of administration.[1]

It is necessary at the close of the administration for the executor to render a detailed account of his transactions. To do this he must keep accurate records. The ultimate purpose of all estate accounts is the fulfilling of the law's requirement that the executor make certain reports covering his stewardship. But even if there were no such requirement, there is so much danger of dispute, so much opportunity for ill-feeling in handling the funds of another in what is usually a personal rather than a strictly business relation, that full records are most desirable. The prudent man, recognizing the difficulties that will arise in the more or less gratuitous care of the business affairs of others—who are often women and children untrained in business—will see the advisability of being most careful to have for his own protection a complete account of all that he has received and all that he has turned over.

> The account should state if an inventory has been filed, and if none has been filed, the account itself should furnish the information usually thus supplied. It should likewise state whether or not advertisements for claims have been published, what claims have been presented, what allowed, and what rejected; and the time and manner in which they were rejected or disputed, and the reason therefor. Also,

[1] Caldicott, Executorship Accounts.

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what claims have been presented and allowed since the expiration of the publication of the advertisement for claims. The accountant should then proceed to credit himself with funeral charges and expenses of administration, with moneys paid to creditors (naming them) and payments to legatees or next of kin. He should state the age of legatees and next of kin, if any are minors, and whether they have guardians, and, if so, their names and places of residence, and how appointed. If there is any other fact which has occurred, as part of his proceedings, which may affect the estate or the rights of any distributee, or his own rights, he is bound to state it. He must not only state in what character his payments were made, as whether to creditors, legatees, or next of kin, or for expenses for funeral charges or of administration, distinctly, but he must produce vouchers supporting each payment, or, in cases of claims under $20.00 where no voucher is produced, he must make and present in lieu of voucher, his own oath positively to the fact of payment, when made, and to whom. Unless the order of the Surrogate, requiring an executor or administrator to render an account of his proceedings, is obeyed in this manner, as plainly indicated by the statute, he will not have made the proper response to the order.[2]

§ 550. Lack of Knowledge of Subject

Many persons who are appointed to act in fiduciary capacities have, at the time of their appointment, little knowledge of the duties imposed upon them. Especially is this true in regard to the manner of keeping their records and preparing reports therefrom for presentation in court. The necessity for this knowledge is often not recognized until they are called upon to render an account of their transactions for the scrutiny of the court before receiving a discharge from the obligations which they have assumed.

The impression that little knowledge is necessary has been caused by the prevalent idea that the sole duties of an executor are to receive and disburse money and, at the end of his ad-

[2] Matter of Dwight, 9 N. Y. Supp. 927, 928.

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ministration, to fill out a blank form provided by the clerk of the probate or surrogate's court. As a result of this impression, testators in selecting their executors have persisted in requiring only social qualifications. Much difficulty and financial loss have thus been caused by the failure of administrators and executors to understand early enough for them to make their records complete, what would be required of them in the way of an accounting, and many quarrels and lawsuits have resulted from the fact that legatees and heirs-at-law have not known the meaning of even the simple terms used in probate accounting. The incompetence of executors generally has become a matter of common knowledge.

§ 551. Increasing Importance of Subject

It seems needless to say that persons who are appointed to take care of estates should be acquainted with the proper manner of keeping their accounts so that when called upon to present statements of their transactions to the court for adjudication they will be able to give all required information in a plain and intelligible form. It seems equally evident that all persons interested in such matters should know enough of estate accounting to understand the records and statements relating to the administration. Today, however, the matter is of unusual importance, because estates are larger than ever before, and the work of the executor has increased proportionately in amount and complexity. More exact accounting is required by the courts now than formerly, and in the future still more precision will be required.

The reaching down of inheritance and transfer taxes to smaller estates and of the income tax to persons of less means is also tending to force a fuller handling of details upon fiduciaries as upon individuals—even more so, because the income tax returns required of fiduciaries are more complex than those required of individuals.

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§ 552. The Legal Obligation to Account

There is a legal obligation on the part of an administrator or executor to keep proper accounts of the handling of money or other property placed in his care. Although the requirements of the different states vary in the specifications as to what is required of an administrator, these variances are not great and in no way affect the fundamental principles involved in the keeping of the accounts.

The law of most states does not prescribe any form of estate bookkeeping even where it does prescribe a form of final accounting. The courts are, however, inclined to hold that if the executor fails to keep books or keeps them in such a manner that it is impossible readily to prepare the final accounting, he may be charged personally with the expense of drawing off that account. For this reason it is especially desirable that the executor keep his current accounts in a way which will enable him to prepare his final accounting without difficulty and at the same time to handle his current work without unnecessary labor.

Although the laws are not usually explicit as to the manner in which estate accounts shall be kept, there are a large number of phrases used in the required reports which will be new to one who has had no dealings with probate work. There is less freedom allowed in probate than in ordinary commercial accounting, because in the latter case only the owners of the business need ordinarily be satisfied, while in the former the account must invariably be rendered to a court.

§ 553. General Principles of Estate Accounting

While it must be understood that there are no absolute rules that can be invariably followed in keeping the books of an estate, there are certain general principles which will apply equally to the accounts of estates of all sizes, whether in charge of administrators, executors, or trustees.

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Fiduciary accounting stands alone in that the:

> . . . idea of proprietorship is nearly or entirely absent, and its place is taken by responsibility or accountability. It always arises from delegated authority, the affairs being placed under the control of some person as representative of the actual owner whose object in keeping accounts is to prove that he has faithfully administered them. . . .
>
> The essence of fiduciary accounting is the ascertaining to what extent the person holding these delegated powers has fulfilled his duties and to what extent he is still accountable. He is *charged* with all property coming under his control, and he is *discharged* by any lawful disposal of it for the good of the estate.[8]

§ 554. Separation of Corpus from Income Must Be Maintained

It is important that the books show separately the principal and the income of an estate. There was a time when the distinction between corpus and income (see Chapter XXXV) was of interest only when a trust was created, but income and inheritance tax laws have made it of importance in the accounting of all estates. Inheritance taxes apply only to the principal; income taxes, from the viewpoint of the estate, apply only to the income. It must, however, be remembered that taxable income is not always exactly identical with income as opposed to corpus. (See § 315.)

Another need for the separation of principal and income is found when dower or curtesy rights enter into the handling of the estate property.

§ 555. All Assets Must Be Accounted For

The disposition of all assets, whether principal or income, must be shown in order to enable the representative to obtain his release. Especial care in this regard is necessary when the income is divisible among several beneficiaries during their lives, as in the event of the death of a beneficiary the income

[8] Sprague, Philosophy of Accounts.

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accrued to the date of his death belongs to the estate of such beneficiary and is payable as he may direct by will, or to his heirs if he dies intestate.

The importance of the executor's being able to show definitely the amount of the income belonging to a minor beneficiary is apparent, as the executor can be called upon by the minor, when he attains his majority, to account for the share of income from the estate to which he may have been entitled.

§ 556. Need of Full Explanations of Entries

The danger always exists with a person not trained in the keeping of accounts, that while the entries he may make are perfectly clear to him at the time, they will become "cold," as is said of stenographers' notes, and will be unintelligible after a short time has elapsed. Auditors know too well how great this failing is among even experienced bookkeepers who are not in the habit of having their books examined in detail and consequently fall into the habit of recording transactions without full explanation of the details, apparently on the theory that since they would not have made the entry if they had not known it was right, there is no need to bother about recording the facts in the case. Every bookkeeper learns sooner or later, if he continues in that occupation, that such a practice will not do, for the time always comes when the details underlying certain entries on the books must be known.

It is more essential that details be fully recorded in the case of an administrator or executor than in the case of the commercial bookkeeper, for the former is not employed because of any confidence in his ability as a bookkeeper, and is seldom chosen by the persons whose property he is handling. In fact he is too often looked upon by them with a certain antagonism rather than with favor. He must be especially careful, because the law, through the public desire to make sure that property left to heirs shall reach them safely, has

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imposed on the administrator certain burdens of personal liability if his acts are not strictly in accordance with statute, or if he has taken undue risks in the handling of property in his control. This may be the case even though he was perfectly conscientious in the taking of these risks, hoping thereby to increase the amount which he might distribute.

§ 557. Service of the Public Accountant

It is this frequent lack of fullness in giving detailed explanations of entries that is the usual cause of a public accountant's being called in where it had not been intended to use one.

> Carelessness and disorder are vices to which both testators and executors are subject, and frequently an accountant is employed because no one without his special training, and the patience which it engenders, could bring order out of the seeming chaos resulting from want of system in recording transactions as they arise.[4]

The sole purpose of keeping estate books is to enable the representative to render an accounting. It is essential that books be kept, and that they be kept in even more detail than would seem to be warranted by the amounts involved were the accounts being kept by or for the decedent himself. The question comes up immediately as to whether an accountant should be employed. This must be decided for the individual case after a study of the complications which are likely to arise in the settlement of the estate, but it is safe to say that in a great many cases in which accountants are not employed, money for the heirs would have been saved had the books been kept from the start by, or under the supervision of, competent accountants. Too often the records are allowed to get into a muddle which costs infinitely more to unravel than would

[4] Caldicott, Executorship Accounts.

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have been the cost of keeping the records properly from the start. This is one of the cases where a stitch in time saves nine.

The public accountant is usually worthy of his hire, and while his fees may seem high it is safe to say, in the case of the men sent out by reputable firms, that the speed with which they work and the reasonable assurance of accuracy should more than make up any difference in per diem rates.

The courts are coming to recognize this fact, and if an administrator asks that he be allowed the sevices of an accountant, the cost being charged to the estate of the deceased, the request is ordinarily granted. The expense is not likely to diminish the amount to be distributed below what it would be were the accounts improperly kept, with the result that they would have to be straightened out later at extra cost, perhaps with the attorneys for the parties at interest appearing again in court. Public accountants are being called upon more and more to assist in the administration of estates, and estate accounting has become a special branch of the accounting profession.

§ 558. Choice of the Accountant

Care must be used in the selection of the accountant. Just as one would not choose an optician to operate for cancer or select a corporation adviser to defend a murderer, so in picking the accountant to handle a set of estate books one should make sure of getting a man who is familiar with probate practice and the forms of reports used in estate matters. If the accountant is to be of the greatest value he must have a knowledge of testamentary law, for the whole scheme of accounts used is different from that of the ordinary set of commercial books. An examination of Chapter LXVII will show that estate accountancy is a branch entirely alone.

If the accountant who is employed is properly trained in

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estate work he can make himself a very valuable assistant to the attorney and to the representatives.

> Apart from the accounts an accountant can often render valuable aid to an executor by his training in administrative work. There are often trades to be carried on, financial arrangements to be made, and many things to be done at the moment with a knowledge and promptitude which arises from practice as liquidators and trustees.[6]

§ 559. Extent of His Employment

The service for which an accountant is usually employed varies with the size of the estate and the complications of the will. It is often wise to let him lay out the form in which the transactions are to be recorded, making the initial entries, and instructing the representative or his clerical assistant in the further use of the books. This is ordinarily inexpensive and materially reduces the amount of labor which will be required later, when the reports are to be prepared, whether by the representative or the accountant.

Many estates employ public accountants for the following objects:

1. To lay out the system and open the books, as above.
2. To make occasional visits and see that the work on the books is being done and done properly.
3. To prepare all reports.

This has proved very satisfactory, for the executor by using care can keep the accounts of an estate in such form that a skilled accountant's service need be called for only once or twice a year. In other cases the accountant writes up all the books from the check stubs. If the executor, in filling out the stubs, gives the full details of the source of receipts and the nature of and cause for all payments, the skilled accountant

[6] Caldicott, Executorship Accounts.

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can readily prepare the proper entries to be made on the journal and ledger, thus providing all the information that may be required. The danger in this method comes from the magnitude of the "if." Too often the details will not have been recorded, and unless the accountant's visits are so frequent that all transactions can still be remembered, there may be an insurmountable difficulty in supplying the needed information.

The degree to which the services of the accountant will prove desirable depends largely on the complexity of the affairs of the decedent, on the number of bequests under the will or the number of heirs if there is no will, on the number of financial transactions, and on the experience of the executor in such matters.

§ 560. Purpose of Part VI

It will be the purpose of this part of the present work to explain the manner of keeping the accounts of estates under the care of administrators, executors, and trustees so as to give the information that may be required in presenting the accounts of estates before the court to be passed upon. The systems of accounting which are suggested are in accord with the best modern practice. In these, one thing especially has been sought—simplicity. There is no reason why probate accounting should be complicated. The forms herein presented have been found in practice to be easy to handle, facilitating the current bookkeeping, and enabling the representative to analyze currently the receipts and disbursements, thus obviating the necessity for extensive analysis at the close of the administration. While the same general principles apply to the work of the administrator, the executor, and the trustee, there are enough differences to warrant separate treatment.

The authors are assuming that the elements of ordinary double-entry bookkeeping are known to those for whom they

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write. Anyone who knows nothing of bookkeeping should study some good elementary work[6] before undertaking this. Elementary bookkeeping is of itself a subject of considerable magnitude which could hardly be embraced in a work of this kind.

Review Questions

1. Why should accurate records be kept of all transactions in the settlement of an estate?
2. How much information as to the duties of an executor or administrator has the average man or woman? What effect should this lack of information have on the selection of executors?
3. Why should those concerned inform themselves better? What two things have increased the complexity of administration?
4. What is the law as to estate accounting in your state? What occurs if proper records are not kept?
5. What is the essence of fiduciary accounting? What takes the place of the proprietory idea?
6. What is the reason that estate books must maintain the separation of corpus and income?
7. What responsibility is assumed by the representative? What is said of a minor's rights?
8. Why are full explanations of all entries desirable? Why is this more important in estate accounting than in ordinary bookkeeping?
9. Why are professional accountants often employed? When is this procedure advisable? Will the court usually allow this expense to be charged against the estate?
10. Can one accountant do as good work as another in estate accounting?
11. To what varying extents may an accountant's assistance be had? On what does the amount of professional assistance required depend?
12. What is the purpose of this part of the book? Why are simple methods desirable? What amount of knowledge of accounts should be possessed by those who use this book?

[6] Such as "Fundamentals of Accounting" by Koopman and Kester.

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CHAPTER LXV

PRELIMINARY MATTERS

§ 561. Advice to the Accountant

Painstaking care is seldom so much needed as when dealing with a mass of papers accumulated by a man who is no longer living and who therefore cannot furnish a clue to any obscure meaning. In an excellent little book, which unfortunately is not of much service in this country because it deals with English law and English money, the following suggestions are offered to the accountant, public or otherwise, who intends to open a set of estate accounts:

> It may be assumed that all men, no matter how unmethodical they may appear, have a system of dealing with papers and documents; it may be a very bad and imperfect system, but it is there, and the accountant's first care must be to find it out, as, once found, it will materially assist him in understanding the testator's affairs. Sometimes it may not appear until weeks have been spent upon the papers, but there is little doubt that the system is there. First, it is desirable to run quickly through the papers, disregarding all which are manifestly irrelevant, then to classify the remainder, and, as far as possible, arrange them in order of date, then to proceed to reduce the information which they contain to notes, and it will be found that by patient comparison, an unfailing memory, and that trick which accountants acquire of recalling a figure which they saw an hour or a week before, it is possible eventually to construct a coherent account. Practice and the habit of concentration will enable the accountant to recall two or three amounts scattered over various papers and mentally adapt them to balance the sum of them which has appeared elsewhere. . . .
>
> One word of advice is desirable in conclusion—never to

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put hasty work into executors' accounts. There are so many points to be determined as to the proper destination of each figure, and there are so many subtleties which may be easily overlooked, that in this, as in so many cases, the safest motto is *"Festina lente."* [1]

§ 562. First Steps

The first thing of an accounting nature which the representative should do is to serve notice of the decedent's death upon all banks in which he had funds, in order that they may cash no more checks against his account, should any be outstanding. The bank accounts should be balanced immediately and, upon securing the bank statements and canceled checks, the statements should be reconciled in the usual manner.

If the decedent had a good set of books kept up to within a short time of his death, the work of the accountant and the representative will be noticeably easier. Soon after his appointment the representative should have these books brought fully up to the date of death and closed.

Much valuable information as to the decedent's affairs will be secured in this way if the work of closing the books is done thoughtfully instead of mechanically. Recent disbursements of the decedent should be examined to see if they will not disclose unknown assets; recent receipts may be partial payments of interest on unknown accounts receivable or may otherwise disclose valuable information.

§ 563. Briefing the Will

The first thing which an executor should do toward active work on the estate books is to analyze or "brief" the will, reducing it to a few short and intelligible sentences.

> It may not infrequently be desirable to obtain the advice of a solicitor to interpret some clauses in a will, but usually an accountant's knowledge is sufficient.[2]

[1] Caldicott, Executorship Accounts.
[2] *Ibid.*

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Care should be taken, however, to make sure that this is accurately done. An example of a brief of the long will shown in Form 1 follows:

ANALYSIS OF WILL OF HENRY H. BECKWITH

Clause	
1.	To Esther R. Beckwith, wife, use during her life of house, 91 West 72nd St., New York City, and of garage in said city, subject to taxes, water rates, and necessary repairs.
2.	To Esther R. Beckwith, wife, all linen, bric-a-brac, works of art, household goods and furniture (useful and ornamental), china, plate, silverware, books and pictures, and motor cars and appurtenances thereto belonging.
3. (a)	To Esther R. Beckwith, wife, use during her life, to extent of $3,000 quarterly, of income from such sum between $200,000 and $300,000, as in the opinion of trustees will be amply sufficient to produce annual income of $12,000.
(b)	To lineal descendants, equally *per stirpes*, use of remainder of income from above trust.
4.	To Henry H. Beckwith, Jr., son, parcel of land on which is summer home at Bristol, Massachusetts, all buildings, contents thereof and appurtenances thereto, and all land in town of Bristol.
5.	To Henry H. Beckwith, Jr., son, all jewelry, wearing apparel, personal ornaments, and effects.
6. (a)	To Rufus A. Beckwith, brother, income during his life from trust of $100,000.
(b)	To Maud Beckwith, sister-in-law, income during her life from trust of $50,000.
(c)	To June Stimson, cousin, income during her life from trust of $20,000.
8. (a)	To Syrian Protestant College, Beirut, Syria, $10,000.
(b)	To Stevens Institute, Hoboken, New Jersey, $10,000.
(c)	To Home for Incurables, New York City, $10,000.
(d)	To Hampton Institute, Virginia, $10,000.
9.	To all legatees, release from payment of any indebtedness due deceased.
10.	To Anne Bays, Helen Gardner, Mary Beckwith Cox, Henry Beckwith, Jr., children, use of income from re-

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mainder until forty years of age; then one-half of principal of his or her share and use during life of income from other half, principal to be paid over as directed by will of each child or to child's heirs-at-law.

11. (a) To Charles A. Barnes, cousin, annuity of $3,000 to be paid semiannually during life.

(b) To Morton F. Barnes, cousin, the same.

(c) To Tuskegee Institute, Tuskegee, Alabama, principals of two funds furnishing annuities to Charles A. Barnes and Morton F. Barnes, to be paid upon termination of each annuity.

15. To Esther R. Beckwith, wife, all property not otherwise disposed of. (Residuary legacy.)

Special Stipulations

12. No amortization to be charged against life tenants.

13. Executors and trustees have power to continue any existing investment although of character not now permitted by law to trustees. May invest in real estate anywhere, or in bonds of any state or government (foreign included), or in bonds, notes, or other paper secured by real estate mortgage anywhere, or in any stocks or bonds of companies in United States or Canada in good credit and standing, or (with written consent of beneficiary) in any property whatever.

14. Executors and trustees may compromise and adjust any claim in any way.

16. No security required from any executor or trustee in any jurisdiction.

It is not a bad plan to copy this brief in the journal or other book of original entry, before any entries have been made. The will may then be put away in a safe place. The original of course will be probated, becoming a court record and therefore accessible, but the executor should preserve his copy to save time and avoid embarrassment.

> The will and the inventory comprise the basis for nearly all of the accounting, and no set of books is really complete without a copy of these documents.[3]

[3] Gottsberger, Accountant's Guide.

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The administrator, having no will to go by, should familiarize himself with the law of distribution prevailing in the state of the decedent's residence. It does not pay to rely upon one's memory about this law because it is frequently amended in the different states.

Review Questions

1. What causes difficulty in dealing with the financial records of a decedent? How may a decedent's papers be classified?
2. What should be done first by an accountant for an estate? What should be done with the books of the decedent?
3. What is "briefing" the will? What is the object of briefing the will? Where may this brief be placed of record?

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CHAPTER LXVI

THE ACCOUNT TO BE RENDERED

§ 564. The Final Accounting

The ultimate purpose of the keeping of estate accounts being, as has been said (see § 549), the fulfilling of the law's requirement that the personal representative file an accounting of his stewardship, it becomes necessary to understand the form of this accounting, the facts which it is required to show, and the conditions under which it is rendered, before one can adequately see the necessity for the many differences between commercial and probate accounting.

The accounting is rendered by the executor or administrator to the court which appointed him, and is usually made after the assets have been collected and the administration and funeral expenses and the debts have been paid, and such payments as the executor has found advisable have been made on account of legacies. Its purpose is to show the amount of cash and property received by the representative, the disposition he has made of it, and the balance, if any, remaining in his possession. The forms of accounting vary in the several states. Some of them are exceedingly simple statements of receipts and disbursements.

Ordinarily this accounting is the only one, and is called the "final" accounting, and on the basis of it the executor's accounts are judicially settled. But when the administration is prolonged or where special circumstances make it advisable, the executor may voluntarily render, or may be compelled to render, one or more intermediate accounts.

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§ 565. Effect of Accounting

As an accounting, whether it is called "intermediate" or "final," is conclusive only as to matters stated in it and as to persons legally notified of it, no accounting can be considered absolutely final. Not infrequently there are several so-called final accountings in the administration of one estate.

After an accounting, it may be discovered that there are assets which the executor has overlooked, or that legal notice of the accounting was not given to all of those entitled to it, one of whom is disposed to resent the disregard of his rights. In such case the executor may be required to render a further accounting.

The matters as to which an accounting is conclusive in the absence of fraud or gross inaccuracy may be summarized as follows:

1. That the executor has been charged with all the money and property that could be discovered at the time of the accounting.
2. That all increases and decreases in the estate assets have been correctly calculated.
3. That the executor has been charged with all interest for which he was responsible.
4. That all payments made to creditors, legatees, or next of kin, and for administration expenses are correct.

§ 566. Time of Accounting

An intermediate account may be filed voluntarily by the representative at any time. A final account may be filed voluntarily at any time after the expiration of the period allowed for the administration of the estate. A compulsory intermediate or final accounting is a matter of statutory regulation and the laws of the several states must be consulted as to when such procedure may be ordered. Such an accounting is usually ordered when the executor has failed to account within a rea-

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sonable time after the administration should have been completed. In some cases an account may be ordered on petition of a creditor or of a legatee whose claim or legacy has not been paid.

§ 567. Procedure in Accounting

The usual procedure is for the personal representative to present the account to the court with a petition that it be allowed, whereupon the court will notify all persons interested in the estate, that on a fixed day the account will be judicially considered. Prior to that day, the account on file with the court is open to inspection. After examining the account on the day named and considering any objections raised against it, the court will render a decision allowing, or refusing to allow, the account. If the account is not allowed, one satisfactory to the court must be presented. If the court is satisfied with the accounting it will issue a decree of distribution directing the executor to make distribution of the estate assets then remaining in his hands as set forth in the decree.

§ 568. Form of Account

It is rarely that the form of account is legally prescribed. The statute usually states broadly what the account shall show. This has resulted in practice in special forms for each state. These forms answer the local statutes and can usually be secured from the clerks of the probate court. In some states they are simply the cash receipts and disbursements, while in others they are more complex and go into greater detail. It always saves work in such matters to follow precedents and use whatever forms the local court approves.

§ 569. Vouchers for the Account

As in all legal accountings an executor is required to make an affidavit that to the best of his knowledge and belief the

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statement rendered is a full and true account of all the assets that have come into his possession and of all his disbursements or disposition of them.

Vouchers are required for disbursements though in some states small payments to a limited amount are excepted from the rule. If any vouchers are lost the executor will be required to prove the payment by other evidence. The vouchers in due form should be filed in court with the account.

Review Questions

1. When is an accounting of administration made? What must it show? Distinguish between final and intermediate accounting.
2. As to what matters is an account conclusive? As to what people? When may a further accounting be required?
3. When may an intermediate account be filed? When a final account? Distinguish between a voluntary and a compulsory account. When may a compulsory account be ordered?
4. What is the usual procedure for an account? If the account is not allowed, what must be done?
5. In what form should an account be rendered? Have you a copy of the form used in your own state?
6. What evidence of the correctness of his account must the personal representative furnish? What is the usual rule as to vouchers?

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CHAPTER LXVII

ACCOUNTS REQUIRED FOR ADMINISTRATORS

§ 570. All Accounts Should Be Based on Final Accounting

The accounts adopted for probate work are different from those in use in general mercantile bookkeeping, but they are easily understood and much less complicated. The accounts which are to be kept on the books of an estate should be chosen with the final accounting always in mind. They should be selected so that the schedules required to be filed with the court may be prepared with the least effort in collecting figures from various sources.

It may be interpolated here that if commercial books were kept more with the idea that the securing of information from them is the real end and the keeping of the books only the means to that end, we should have less red tape and more understanding of the vital part the accountant should play in the business organization, with a resulting greater willingness to furnish him with adequate tools and sufficient help.

Any scheme of accounts should be so planned as to yield most easily the information which is desired. Knowing exactly what will be required from a set of estate books, an account may be devoted to each of these items.

> It is very desirable that each schedule should be represented by an account in the books of the fiduciary; the name of the schedule may form part of its title.[1]

§ 571. Information Needed for Final Accounting

An examination of the summary at the beginning of Form 26 will show the information which will usually be required in

[1] Sprague, The Philosophy of Accounts.

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the final accounting of an administrator. Separating corpus from income, this information may be summarized as follows:

As to corpus:

1. The amount of the inventory as appraised.
2. Assets discovered after the filing of the inventory.
3. Gain from realizing on the inventory.
4. Loss from realizing on the inventory.
5. Assets not realized upon.
6. Funeral and administration expenses paid.
7. Payments on debts of decedent.
8. Distribution of cash.
9. Distribution of assets other than cash.
10. Balance of corpus cash on hand.

As to income:

1. Income received.
2. Losses of income.
3. Expenses paid against income.
4. Distribution of income.
5. Balance of income cash on hand.

§ 572. Separation of Corpus from Income Advisable

Since in the case of an intestate a trust cannot be created except by the operation of dower or curtesy rights, the separation of corpus from income might seem unnecessary. This separation is, however, always wise for two reasons: (1) the inheritance tax laws apply only against the corpus, and (2) the administrator should be in a position to show easily what gains and losses have occurred as a result of his management and what are due to improper appraising.

§ 573. Other Accounts Needed

It has been said that one account should be maintained for each classification which will be needed for the final accounting, except when one is by nature the residue or balance

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left in another, as in the case of Assets Not Realized Upon, which is the closing balance of the amount of the inventory as appraised. This number of accounts does not, however, quite exhaust the necessities.

The list above seems to include assets and liabilities, income and expense. But in double-entry bookkeeping there is another group, the net worth or proprietorship accounts, i.e., Capital, Capital Investment, Capital Stock, Surplus, etc., as may be required under varying circumstances. The place of this group in the scheme of estate accounts is taken by an account known as "Estate Corpus" during executorship or administratorship and "Estate Principal" during trusteeship.[2]

Whenever the books are closed, the balance of this account is the amount of the corpus of the estate in accordance with the various valuations used. Like proprietorship accounts it is necessarily a credit account, showing the extent of the accountability of the fiduciary.

The term "Cash account," as is used in this chapter, is generic. In practice it is found best to have a separate account for each "active" bank account, i.e., for each bank account which is to be used for current depositing and checking purposes. Inactive bank accounts, such as savings accounts, may, if desired, be totalled together in one ledger account.

Emphasis has been placed on the separation of corpus and income, but further than this, because the preparation of income tax returns requires an analysis of the income, the books must show the source from which it is derived, not, for this purpose, by personal accounts, but in a way that will indicate the nature of the transaction from which it results. In the same way, for income tax purposes the expenses must be analyzed in order that in the returns the schedules accounting for the deductions from gross income may properly be filled out.

[2] This distinction between the use of the two names of the account is not rigidly followed, many authorities seeming to use the names interchangeably.

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This information in the ordinary estate can easily be secured by going through the Income account at the end of the year and ascertaining how much of the income was received from rent, how much from interest, etc., and by analyzing the Funeral and Administration Expenses account to show how much was spent for repairs, how much for office supplies, how much for attorney's fees, etc.

In a large estate where the transactions are numerous, it will be found much easier to open separate accounts for all the items of most frequent occurrence instead of lumping all income into one Income account and all expense into the Funeral and Administration Expenses account.

§ 574. Liabilities

> A fact which will strike the commercial bookkeeper upon examining an executor's account is that the inventory upon which it begins is an inventory of assets only, no reference being made to indebtedness even if shown on the books of the decedent, and no deduction being made for them. Debts only appear thru their payment.[8]

This is a very important distinction. Where in commercial practice it is considered essential to enter liabilities as they are incurred, in probate practice the account known as "Debts of Decedent" is debited as payments are made in full or on account, no counter-entry being made until the Debts of Decedent account is closed at the time of rendering an accounting.

The theory upon which this procedure is based is that the books of the estate represent the liability of the personal representative rather than the net worth of the estate, and that the representative is liable to the proper persons, not for the net value of the estate, but for the amount of the assets which have been turned over to him. The only variation from this feature is in the entry on the books of real estate which does

[8] Sprague, The Philosophy of Accounts.

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not come into the hands of the executor, but passes immediately to the legatees or heirs-at-law. (See § 615.)

The Federal Income Tax Law requires that mortgaged and pledged property be inventoried at its gross value and that the amount of the liability thereon be shown separately as a deduction. For this reason it has been recommended (see § 342) that the inventory which is made for all purposes include the real estate at its gross value, the mortgage indebtedness being considered a debt of the decedent. This is important for the further reason that the representative is entitled to his commission on the gross as well as the net value.

§ 575. Uses of Accounts

The following synopsis presents the uses of the accounts:

Debited With	CASH	*Credited With*
Cash included in inventory and all receipts.		All disbursements.

CORPUS GROUP

INVENTORY

Appraised value of corpus of estate.	Appraised value of each inventoried asset turned into cash, distributed, or otherwise disposed of.

ASSETS NOT IN INVENTORY

	Amount realized from all after-discovered assets.

GAIN ON REALIZATION

	Difference between appraised value and selling price of assets sold above appraised value.

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Loss on Realization

Debited With	*Credited With*
Difference between appraised value and selling price of all assets sold below appraised value; appraised value of assets stolen, destroyed by fire, etc.	

Funeral and Administration Expenses

All allowable funeral expenses and all just charges for administering the estate. (See §§ 265, 268, and 592.)	

Debts of Decedent

All payments made on indebtedness existing at decedent's death. (See §§ 574, 599.)	

Distribution of Cash

Amounts of cash distributed. (See § 594.)	

Distribution of Assets Other Than Cash

Appraised value of other assets distributed. (See § 594.)	

Estate Corpus

	The appraised value of the inventory.

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INCOME GROUP

INCOME

Debited With	*Credited With*
	All receipts of income. (See § 598.)

LOSS ON INCOME

The amounts of all income lost by theft, fire, or other casualty.	

EXPENSE, INCOME

All expenses which are just charges against the income. (See § 600.)	

DISTRIBUTION OF INCOME

Amounts of income distributed.	

§ 576. General Scheme

The handling of the transactions under such a scheme of accounts is as follows:

At the beginning of the administration the estate assets are debited to Inventory, and the total amount of them is credited to Estate Corpus. The amount of cash in the inventory is credited to Inventory and debited to Cash.

Subsequent receipts of cash by the administrator are debited to Cash. If they are from the sale of assets included in the inventory they are credited to Inventory to the amount of the appraised value, any increase therein being credited to Gain on Realization, or any loss thereon debited to Loss on Realization. Receipts from the sale of assets which, although they belonged to the decedent at the time of death, were for some reason not included in the inventory, are credited to Assets

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Not in Inventory. Receipts of income earned by the estate assets during administration are credited to Income.

Payments of cash or distributions of assets made by the administrator are credited to Cash or Inventory. Payments made on account of debts existing at the time of the decedent's death are charged to Debts of Decedent. Payments of expenses which are deductions from the corpus of the estate are debited to Funeral and Administration Expenses. Payments of expenses which are to be deductions from the income are charged to Expense, Income. Losses of income from theft, etc., are debited to Loss on Income. Cash divided among the heirs-at-law is charged to Distribution of Cash if it is from corpus or to Distribution of Income if from income. Other assets divided (if from corpus, as is usually the case) are debited to Distribution of Assets Other Than Cash. If this is all done accurately the books are in shape for closing.

§ 577. Method of Closing

When an accounting is to be made the books should be closed: (See Chapter LXXI.) In brief, the closing is effected by:

1. Crediting Estate Corpus and debiting the corpus gain accounts (Assets Not in Inventory; Gain on Realization) with amounts sufficient to balance the latter.
2. Debiting Estate Corpus and crediting the corpus loss accounts (Loss on Realization; Funeral and Administration Expenses; Debts of Decedent; Distribution of Cash; Distribution of Assets Other Than Cash) with amounts sufficient to balance the latter.
3. Debiting Income and crediting the income loss accounts (Loss on Income; Expense, Income; Distribution of Income) with amounts sufficient to balance the latter.

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§ 578. Subdivision of the Inventory Account

As one of the principal functions of a representative (see § 115) is to realize on the assets, the accounting scheme should be so arranged as to record the process and progress of realization. For this reason the cash is separated from the other assets and removed to a separate account, although it is at first included in the Inventory account.

> The two accounts "Cash" and "Inventory" represent the executor and all the others represent the estate.[4]

Some writers [5] on this subject have recommended the further subdivision of the Inventory account into accounts with the various groupings used in the inventory (see § 281), but with the exception of cash, it is hard to see what good can result from this. A realization account can be kept without such subdivision. In commercial practice the various assets would of course be treated through separate accounts, but the purpose of commercial accounts is not the same as that of estate accounts, and the end for which the work of accounting is done should always be kept in mind. The law of no state requires such subdivision on the books, and it is not seen what labor is saved or what good is accomplished by this subdivision of the inventory beyond a separation of cash, since the form of the realization account required in no state makes necessary an accounting for the inventory by groups, whereas all states require an accounting for each item. This can more easily be kept through a work sheet which forms a subsidiary ledger to the Inventory account as a whole. (See § 585.) But if this subdividing is indulged in at all, it should be with reason and not by an arbitrary division of each group of inventoried assets into an account. If there were only three accounts receivable, one listed on the inventory under Accounts Receiv-

[4] Sprague, The Philosophy of Accounts.
[5] Especially Baugh and Schmeisser in Theory and Practice of Estate Accounting.

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able, *Sperate,* one under Accounts Receivable, Doubtful, and one under Accounts Receivable, *Desperate,* it would be absurd to open a ledger account for each of these classifications.

To make a reasonable subdivision the inventory must be analyzed and the assets divided into groups so that the accounts in which they are to be carried on the books will present a logical classification of the items without burdening any account and without making so fine a division that the books will be overburdened with accounts to which there will be but few entries. To give an exaggerated example, in the case of an estate not much of which was invested it would be entirely permissible to carry all the invested assets in an Estate Investments account; for another estate it might seem to be desirable to divide this account into Stocks and Bonds, and Real Estate Mortgages; in another estate it might seem wise further to divide the former of these into two accounts, one for stocks and one for bonds; in a third the latter of these two subgroups might be contained in three accounts called "Railway and Industrial Bonds," "Municipal Bonds," and "Liberty Loan Bonds."

A sense of proportion must be applied in such matters if the bookkeeping is to be free from unnecessary labor. The accounts must be so chosen that there will be a balance between the work involved in obtaining detailed information from memorandum records or subsidiary ledgers on the one hand and the extra labor caused by increasing the number of general ledger accounts. Under this plan far more accounts are usually necessary for the administrator or executor than for the trustee, as the former usually has to realize on many assets, turning them into cash and perhaps investing this cash permanently, whereas the trustee has only such assets as are considered worth retaining as permanent investments. The administrator will, for example, have debts receivable which will ordinarily be closed out before the trustee takes hold.

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§ 579. Summary

It is believed that enough has been said above to explain the general theory of the use of all the accounts necessary in estate books. These accounts are designed to record the fulfilment of the functions of an administrator, which have been analyzed as follows:[6]

Realization of appraised value of assets:

Cash	$.....	
Inventory		$.....

Realization of excess above appraised value:

Cash	$.....	
Gain on Realization		$.....

Realization of deficiency below appraised value:

Loss on Realization	$.....	
Cash		$.....

Realization of assets not inventoried:

Cash	$.....	
Assets Not in Inventory		$.....

Collection of income:

Cash	$.....	
Income		$.....

Expense against income:

Expense, Income	$.....	
Cash		$.....

Expense against corpus:

Funeral and Administration Expenses	$.....	
Cash		$.....

[6] This analysis is suggested by Charles E. Sprague, in The Philosophy of Accounts, but is changed here to agree with the names of accounts used in this work, whereas Sprague uses only schedule numbers.

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Payments on indebtedness existing at decedent's death:

Debts of Decedent	$.....	
Cash		$.....

Distribution:

Distribution of Cash, Distribution of Assets Other Than Cash or Distribution of Income	$.....	
Cash or Inventory		$.....

Loss on income:

Loss on Income	$.....	
Cash or Inventory		$.....

Review Questions

1. What determines the accounts to be used for an estate? What does the word "schedule" mean in this connection?
2. Into what two divisions are probate accounts divided? What are the accounts under each head?
3. Why is the separation of corpus from income always desirable?
4. What account in probate work answers to the proprietorship accounts in ordinary accounting? What is the balance of this account?
5. Why are liabilities not entered on estate records? Why do not the books show the net worth of the estate? Why is real estate entered at its gross value?
6. What accounts are used and with what is each account debited and credited?
7. What are the initial debits and credits? How are cash receipt items treated? How are cash payment items treated?
8. What are the successive steps in closing the books?
9. How far should the Inventory account be subdivided in probate work? On what does reasonable subdivision depend? Why does a trustee have fewer accounts than an executor or administrator?
10. Is there any difference in the forms of entries given for estate accounting and the usual double-entry system?

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CHAPTER LXVIII

BOOKS TO BE KEPT BY ADMINISTRATORS

§ 580. Form Not the Most Important Thing

The form of the books in which the financial records of the estate are kept is not so material as is the correct use of the accounts. Probate accountancy presents to the commercial bookkeeper a new nomenclature for the nominal accounts, and some new practices in such matters as the handling of liabilities, etc., but so long as these are understood and properly handled, the merely mechanical vehicles used for the recording of the transactions are a matter of personal preference. No objection can be raised to the forms used in any system if through them one may accomplish the desired result, but it is believed that the greatest efficiency will be found in the forms suggested and consequently a certain emphasis is laid upon them.

§ 581. Single Entry Not Suitable

If the estate is small and the provisions of the will are not complicated by the establishment of any trusts of unusual difficulty in handling, the opinion has been prevalent that the accounts may be kept by single entry with entire satisfaction. There is, however, no case so simple that a properly adapted form of double-entry bookkeeping cannot be used more easily in the long run and to greater advantage than single entry.

The requirements of the income tax laws can be met more readily by double entry, which has therefore become more important within recent years. Double entry has the further advantage that it recognizes, while single entry ignores, the dual nature of all transactions, i.e., the fact that if money comes in there must be a source; if it goes out there must be a destina-

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tion—if any change occurs there must be an equal "change from" and "change to." The purpose of the nominal accounts which distinguish double entry from single entry is to collect under distinct classifications assets of certain natures, liabilities of particular kinds, income from certain sources, and expenses for different things.

> Pure single entry is limited to personal accounts, but in its practical application a Cash account is usually kept. There may be other impersonal accounts of a memorandum nature, such as Sales and Expense; but, when any impersonal accounts are introduced the system is no longer pure single entry.
>
> Single entry, therefore, does not record equal debits and credits for each transaction, it does not provide for a trial balance, it does not furnish adequate checks on the accuracy of the work on the books of account, and it gives no organized information of the elements of operation.[1]

In fact it may be said that a single-entry system is no system at all, but merely a makeshift.

§ 582. The Self-Posting Ledger, Journal Ledger, or Synoptic

There is a form of account book which has won much favor in England and Canada and in some parts of the United States (especially in Ohio), and which is especially adapted to the accounts of administrators and trustees. This form (see Form 26) has all the ease of single entry with none of its disadvantages. It will be seen that this consists of a many-column journal having one or two columns devoted to each account, so that the book becomes a cash journal of such complete distribution that all the ledger accounts are represented therein. Any 24-column double-page columnar sheet, fitting an 11 x 17 binder, will provide ample space for all contingencies.[2] In the case presented here only 21 columns are used.

[1] Walton, Advanced Accounting.

[2] Some states forbid the use of loose-leaf books by fiduciaries. A 20-column bound cash journal will serve fully as well.

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Such a book is called a "self-posting ledger," a "journal ledger," and various other names, but of all which have been suggested, "synoptic" is probably the best, being short as well as descriptive. The word is derived from the same Greek root as is "synopsis" and is a substantive use of the adjective "synoptic," which Webster defines as: "Affording a general view of the whole, or of the principal parts of a thing."

The accounts of trust companies are coming to be generally carried on such a form as this.

§ 583. Principle of the Synoptic

The synoptic is essentially a double-entry book. Each line must contain equal debits and credits if the record is to be true. Entry No. 1, for example (Form 26), shows a debit of $2,100 to Cash and a credit of the same amount to Inventory. Expressed in journal form this entry would be:

Cash, Dr.	$2,100.00	
Inventory, Cr.		$2,100.00

Entry No. 26 shows a debit to Cash of $9,500, a credit to Inventory of $9,000, and a credit to Gain on Realization of $500. In journal form it would be:

Cash	$9,500.00	
Inventory		$9,000.00
Gain on Realization		500.00

Since in every entry we have equal debits and credits, on each page we will have a total of debits equal to the total of the credits, because of the algebraic theorem that, if equals are added to equals, the sum will be equal. Therefore the sum of the page totals of all the debit columns *must* equal the sum of the page totals of all the credit columns, with the result that the sum of all the debit balances in the book must equal the sum of

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all the credit balances. The trial balance is thus taken directly from the synoptic.[8]

§ 584. Advantages of the Synoptic

The synoptic has three marked advantages:

1. It is easy to learn to use. The bookkeeper who has never acquired the cash journal habit may prefer to use the old-fashioned cash book and journal, making postings to his ledger in the usual way. If, however, he has begun to use an "analytical" or columnar cash book, i.e., one in which several columns are provided for entry of receipts or disbursements directly to the most commonly used accounts, he will have no trouble in adapting himself to this much less tedious method. If the person who is to keep the accounts is not a bookkeeper by occupation, and has acquired no definite habits which the bookkeeper so often finds it hard to break, he will find the method outlined to be a much easier one to learn than the use of the older separate cash book, journal, and ledger.

2. It involves less work than any other method. Fewer pages have to be turned. An entry made in one record is not recopied in others, for the use of the synoptic makes general ledger posting unnecessary. All the accounts are carried on the double page and the difference between the debit and credit totals of any account at any time is what would be the ledger balance of that account.

> It is an advantage to have full details upon the face of each Ledger Account, and, unless the entries are very numerous, it is better to make the whole in one book, which thus becomes Journal, Cash Book and Ledger in one. . . . Where a Journal is used there is a tendency to exclude the information from the Ledger Accounts, and the necessity for constant reference hampers an accountant when he desires to extract information, while it reduces what should

[8] In referring to Form 26, it should be noted that the columns headed Entry No. and See Section are inserted merely for convenient reference in the text.

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be perfect simplicity to hopeless confusion, when the accounts are submitted to an executor or legatee.[4]

3. It makes the understanding of the entries and the explanation of them to other persons much easier than the use of the cash book, journal, and ledger, because all the transactions of a period are before one's eyes at a glance, with their effect on the ledger accounts, the condition of all of which can be readily grasped without the turning of pages.

The next chapter presents a set of transactions of a typical administratorship carried through the synoptic.

§ 585. The Realization Account

No matter what style of books is adopted, there should be kept as a subsidiary record a list of the inventory items with the appraised value of each. Maintaining general ledger accounts with each group of inventory assets (see § 578) will not serve the purpose, because the schedule required for the final accounting must, to be complete, show the realization on each sale. (See § 555.) Even if this were not so, it is necessary to keep this record in some form for convenient reference as to what is unsold and to facilitate an audit of the accounts, whether by an interested person or a professional accountant.

This detail of the realization on the assets is most easily shown by a schedule in six columns (see Form 27), the first containing the value of each asset (including cash) as appraised in the inventory; the second showing the amount of cash realized from each asset; the third, the difference between the first and second if the amount in the second column opposite the item is lower than the amount in the first (see § 603, "Loss on Realization"); the fourth, that difference when the amount in the second column opposite the item is higher than that in the first (see § 603, "Gain on Realization"); and the

[4] Caldicott, Executorship Accounts.

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fifth, the appraised value of assets distributed without realization or of deferred expenses charged against income. (See § 608.) When it is desired to close the books it is necessary to carry over to the sixth column the appraised value of all the assets which have not been disposed of. The total of this column, plus the totals of the second, third, and fifth, minus the total of the fourth, *must* equal the total of the first, if no error has been made in recording or adding.

The Realization account thus prepared has been spoken of above as a "subsidiary" record. It is subsidiary to the Inventory account on the general ledger. This means that the difference between the total debits and the total credits in the Realization account must always equal the balance in the Inventory account. In other words, the sum of the totals of the entries made in the first and fourth columns at any date, minus the sum of the totals of the second, third, and fifth, would be the total of the sixth if it were filled in, and also the balance in the Inventory account on the general ledger or synoptic at the same date, since that is the appraised value of the unsold assets on that date.

Some accountants have felt that the keeping of the Realization account in addition to the careful record of the synoptic or other set of books involves unnecessary duplication. It is doubtful if this is true. The Realization account shows at a glance the assets which have and have not been disposed of, two things which the executor would otherwise have to search out frequently unless he checked a copy of the inventory as he disposed of the assets, a method which would easily lead to errors because of the lack of a reconciliation with the general books. The keeping of the Realization account has the further advantage that the most difficult schedules of the final accounting are thereby prepared, whereas otherwise the information for those schedules would have to be separately secured at the time of closing. The Realization account is a schedule show-

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ing the amount realized on each of a list of assets; the general books are a financial history.

§ 586. Assets Not in Inventory

It is rarely possible at the beginning of an administration to discover all the property of the decedent. Very often there are accruals of various sorts which are unknown to the executor until he begins to collect the assets. Sometimes an entire bank deposit will be unknown at the time the inventory is prepared.

Such after-discovered assets may be handled in the same manner as inventoried assets, and in fact are most advantageously handled by an extension of the same form. (See end of Form 27.) For after-discovered assets the amount shown in the first column is the amount realized upon a sale, if the asset is sold, or, in other cases, the fair market value.

There will thus be no gain or loss on the realization of after-discovered assets except in cases of theft, fire, etc., because the valuations at which they are to be charged in are not entered until they are disposed of and the charging-out values determined. Each such asset should be listed for memorandum purposes as soon as discovered, although the value will probably not be added until later. If the asset is not disposed of before the books are closed, the procedure outlined in § 627 should be followed.

§ 587. The Check Books

The check stubs should show the number of each check, its date, the name of the payee, the description or the nature of such payment, and the amount, as for instance: "No. 1, April 25, 1900, Smith and Jones, Undertakers, bill dated March 25, $175."

By thus depositing all moneys belonging to the estate in the bank account of the estate and by making all payments

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on account of the estate by checks on the same bank account and making the necessary entries in the check book, the executor will have a complete record of all his receipts and disbursements in his check book.[8]

§ 588. Diary

The representative should record in a diary the details of all important events, so that he will always have at hand memoranda from which he can refresh his memory when necessary. The notations in this book should be cross-referenced to entries on the books of account and to the folios of other estate files or public documents. By this practice much time will be saved in locating the records which have to do with the notations.

Examples of the information which should appear in the diary are:

1. Date of reading of will.
2. Steps taken by personal representative before formal appointment.
3. Date of employment of counsel and reasons for choice, with notations as to agreement for compensation.
4. Efforts to locate heirs or proper distributees.
5. Efforts to collect assets.
6. Details of conversations with attorneys, inheritance tax officers, etc.
7. Dates of signing of various court orders, such as that requiring advertising for claims.

It is a good practice to paste in the diary printed copies of all notices, advertisements, and announcements incident to the probate and subsequent procedure.

§ 589. Other Books

Innumerable other records might be suggested. Memoranda should be kept showing when interest, rents, etc., both

[8] Gottsberger, Accountant's Guide.

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receivable and payable, are due. Larger estates require the use of investment record books, notes payable registers, etc. As none of these are in any way peculiar to estate accounting they will not be discussed in detail, although a few forms of additional records are described in § 697. The fiduciary who is handling an estate whose affairs are so complicated as to necessitate the use of such records as these, would do well either to make sure that he has a competent bookkeeper or to arrange for the services of public accountants along one of the lines suggested in § 559.

Review Questions

1. Is the choice of forms used in probate accounting of vital importance? What is the object of the books that are kept?
2. Why is double entry superior to single entry?
3. Describe the form of book recommended in this work. What are three of the many names given it?
4. Describe how the double-entry principle is utilized in the synoptic?
5. Give the three advantages of the synoptic.
6. What is the object of a realization account? How are six columns used to keep this account? How do they balance when correctly kept? To what is the realization account subsidiary? What are the advantages of the realization account?
7. How may assets not in inventory be shown in the realization account?
8. How should check stubs be kept?
9. Why should a diary be kept? What should be recorded in the diary?
10. What other records may be kept?

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CHAPTER LXIX

TYPICAL ENTRIES FOR THE ADMINISTRATOR

§ 590. Purpose of Chapter

In this chapter the transactions which most commonly occur in the handling of an administratorship are given, together with the accounting entries necessary to record them. It is improbable that all the conditions presented here would exist in any one case. On the other hand, to present all the transactions which might occur would be an interminable task. An effort has been made, however, to suggest the proper manner of recording other complications that may arise.

Some of these transactions, applied to the estate of an intestate who died on October 15, 1919, are shown recorded on the suggested form of books of original entry (see Form 26), in order that the manner of keeping the books may be made as clear as possible. No effort is made to carry the books of an estate through from the demise to the final accounting. The entries given have, on the contrary, been restricted as nearly as possible to one of each kind in order not to overburden the text. In studying them it must be borne in mind that these are but scattered transactions, shown to make clear the use of the synoptic rather than to attempt to show the complete record of an estate. Each transaction shown is commented on in the text, and references are made to the earlier sections of this work which give explanations of the rules of law, principles of accounting, or customary practices involved in the transactions and the records of them. Cross-references are given to other sections dealing with related matters.

In all that follows in reference to the handling of the ac-

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counts of an estate, no suggestions will be made as to what payments may be made or when they may be made, as these points have been separately treated in connection with the examination of the law earlier in this work. The instructions given for the entry of various transactions on the books presuppose the proper authority from court or statute, and in this study of accounting methods it is not to be assumed that, because attention is not called to the necessity for obtaining the permission of the court to perform certain acts, there is no necessity for obtaining such permission.

§ 591. Entries Before Appraisal

Theoretically the inventory should be the first thing to appear on the books. However, it will usually be necessary to enter various transactions before the appraisal is completed. Examples of this are the first seven entries presented herewith. (See Form 26.) Although the transactions shown are not presented in strict chronological order, these seven may be considered as a group by themselves.

The first of these represents the receipt of a dividend on the day following the decedent's death. It has been explained (see § 575) that the Inventory account is to be debited with the appraised value of the corpus of the estate, and that it is to be credited with the appraised value of each inventoried asset turned into cash, distributed, or otherwise disposed of. If the inventory had been completed, all would be simple in the matter of this dividend. The entry would be simply:

Cash ..... $.....
    Inventory ..... $.....

The inventory not yet having been taken, however, the same entry will be made (Entry No. 1 on Form 26), but it becomes incumbent upon the administrator to see that the figure which he has credited to Inventory account is the figure at

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which the dividend is computed in the appraisal, as otherwise his Inventory account will not clear itself at the time he renders his account.

Entry No. 5 shows similarly the receipt of proceeds of a life insurance policy.

§ 592. Funeral and Administration Expenses

Entry No. 2 shows a typical payment of an administration expense. The law defining such expenses is set out in §110. A payment of funeral expenses is shown in Entry No. 7. Entry No. 19, for repairs to an automobile, is a proper charge against this account because the repairs were made with a view to increasing the price for which the car could be sold.

These entries will serve to show also the manner in which all disbursements are handled on the books, the amount paid being entered as a credit to Cash and a debit to the account which is to be charged with the amount of the disbursement.

It is wise to provide on the synoptic for refunds of overpayments on administration expenses. These are likely to be somewhat numerous. The personal representative may have paid rent in advance and, upon not needing the rented property the full period, may receive a refund. Such a transaction would be recorded as:

Cash ..... $.....
    Funeral and Administration Expenses. $.....

To accommodate such entries the latter account on the synoptic is provided with two columns, the second of which is for the credit entries.

§ 593. Taking Over Decedent's Bank Account

As soon as the administrator secures his letters testamentary he should present them at the decedent's bank and secure possession of the decedent's funds. The entry in this case

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is like the one described in § 591 above, in that the asset has not yet been inventoried, and the same principles will apply, the entry being (No. 3):

Cash	$.....	
Inventory		$.....

When it is possible to adopt the theoretically correct practice of entering the inventory first, this entry should follow immediately thereafter.

If a separate cash book, journal, and ledger are used, and entries like the one described in §592 above are necessary before appraisal, it is customary to leave the first line on the debit side blank in order that the amount of cash on hand at the time of death may be entered as soon as it is determined by the inventory. In such cases the bookkeeper may elect to have the cash book show only the active or checking bank accounts so as to carry nothing but the funds available for current use. All inactive deposits, such as savings accounts, will in that event be represented on the ledger by separate accounts.

In using the synoptic, the inactive bank accounts are carried in one pair of columns. The transfer of a savings account from the inventory is shown in Entry No. 4.

§ 594. Distribution of Cash and Other Assets

If the estate funds are sufficient and there seems to be no doubt of the estate's solvency, the administrator may be willing to pay to the heirs reasonable advances on the final distribution. These payments are entered as follows (No. 6):

Distribution of Cash	$.....	
Cash		$.....

The law in reference to such payments has been set out in Chapter XVII. The administrator must remember to deduct the state inheritance taxes from the amounts which he can dis-

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tribute and not to allow the payments to exceed the difference. The usual practice in making advance distributions is to divide a certain amount among the heirs in proportion to their respective rights in the total which will eventually be distributed to the legatees.

If one of the heirs, with the proper consent, takes over at the appraised or other value any of the assets other than cash distributed, receiving these in lieu of his regular distributive shares, such a transfer is to be considered a sale of the asset to the heir. In such cases it is always best, in order to make the record complete, to issue to the heir a check for the amount of the sale, if the administrator is willing not to require the heir to pay out his own money. The heir may then issue his own check or indorse the check just received, in either of which cases the administrator will deposit the amount received. Such a transaction is shown by Entries Nos. 21 and 22.

§ 595. Outstanding Checks of Decedent

Since any checks issued by the decedent prior to his death become void if not presented for payment before the bank on which they were drawn learns of the demise (see § 297), the amounts which they represent become debts of the decedent payable out of corpus. In Entry No. 8 the administrator records the taking up of a check outstanding at the time of the demise by one drawn on the estate funds. The entry is:

Debts of Decedent	$.....	
Cash		$.....

§ 596. Entering the Inventory

The entry setting up the inventory on the books will be made in the following form (Entry No. 9):

Inventory	$.....	
Estate Corpus		$.....

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This is done in order to show in one account the charging of the representative with the amount of the inventory, since the first item in the final accounting (see § 632) will be the charge for the amount of the original inventory. (See Form 28.)

The use of the Inventory account has been explained in § 575, and the manner of entering assets realized upon in advance of the completion of the inventory has been set forth in § 591. As has been said, care must be taken to see that the credit given to the Inventory account at the time of realizing upon each asset is the same as the amount with which the Inventory account has been debited for that asset, i.e., its appraised value. If this is not done the accounts will not close out properly to show the necessary clearance for the executor or administrator.

For this reason it is wise at the time of entering the inventory to examine the credits (Entries Nos. 1, 3, 4 and 5) which have previously been passed to the Inventory account to make sure that all the items have been credited to that account at the figures at which they were included in the inventory. In the present instance, if the life insurance policy had erroneously been inventoried at only the principal of $5,000, the dividend of $177.69 having been ignored, it would now be necessary to make a correcting entry for the difference

Cash	$177.69	
Gain on Realization		$177.69

or else to correct the previous entry so that it would read

Cash	$5,177.69	
Inventory		$5,000.00
Gain on Realization		177.69

The credit to Gain on Realization account instead of to Assets Not in Inventory is suggested on the theory that the policy and the dividend are one, worth $5,177.69 instead of $5,000.

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§ 597. Payments on Taxes on Real and Personal Property

There is no apportionment of taxes between corpus and income, as they are regarded as absolute debts at the date of their assessment. (See § 205.) For this reason payments of taxes assessed prior to the death of the decedent, whether or not actually due before the demise, are debited to Debts of Decedent (Entry No. 10). Taxes assessed after his death, however, are debited to Expense, Income (Entries Nos. 24 and 33).

Since the realty usually passes directly to the heirs without coming into the estate, the only real estate taxes to be paid by the administrator are those assessed prior to the date of death. The date of assessment is generally construed as being the date on which the levy was certified to the assessing officer or was adopted by ordinance or statute, as may be the case in the particular jurisdiction.

We have, then, the following summary of the transactions having to do with the local property taxes:

Tax for last half of 1918. Assessor's valuation placed in spring of 1918; tax levied in fall of 1918 (before demise). Due fall of 1919: personalty, $2,758.41; realty, $1,243.69; both charged to Debts of Decedent (Entry No. 10).

Taxes for 1919. Assessor's valuation placed in spring of 1919; tax levied in fall of 1919 (after demise). First half due spring of 1920: personalty, $3,012.26, charged to Expense, Income (Entry No. 24); realty, $1,299.91, paid by heirs. Second half due fall of 1920: personalty, $3,012.26, charged to Expense, Income (Entry No. 33); realty, $1,299.91, paid by heirs.

§ 598. Income

Entry No. 11 shows the credit for the semiannual interest on the savings account in the Montrose Trust Company. The part of this interest which had accrued prior to the decedent's death on October 15 must be handled on the books separately

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from that which was earned after that date, the former being a part of the corpus (see § 307) and included in the inventory, and the latter being income.[1]

Therefore the entry for the interest is:

Cash	$60.00	
Inventory		$35.00
Income		25.00

Entries Nos. 12 and 13 show the receipt and division between corpus and income of two other items of interest. In Entry No. 25 there is shown the receipt of interest, none of which had accrued prior to the decedent's death.

> The Income Account . . . tells its story (which commences from the death) and shows what income was produced by the estate, and from what source income was derived.[2]

§ 599. Debts of Decedent

The executor is now ready to begin paying ordinary claims against the estate. (For law, see Chapter XIV.) Entry No. 14 is typical of the payment of a simple debt which had been incurred by the decedent:

Debts of Decedent	$.....	
Cash		$.....

§ 600. Expense Against Income

Just as interest receivable which had accrued before the decedent's death is corpus and that accrued after the demise is income, so interest payable accrued before the decedent's death is a charge against corpus (debited to Debts of Decedent) and that accrued after the demise is a charge against income (debited to Expense, Income). Entry No. 15 shows the

[1] The state laws as to the computation of interest should always be followed. The federal law and the statutes of many states require that the 365-day basis be used.
[2] Caldicott, Executorship Accounts.

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payment of a mortgage note for $1,000, the interest of $30 having accrued as follows:

July 6, 1919, to Oct. 15, 1919	$18.33
Oct. 16, 1919, to Jan. 5, 1920	11.67

The amount of the charge against corpus is then

Principal	$1,000.00
Interest to Oct. 15, 1918	18.33
	$1,018.33

and the entry becomes:

Debts of Decedent	$1,018.33	
Expense, Income	11.67	
Cash		$1,030.00

There are in this transaction two possibilities of confusion. It is presupposed that the decedent had purchased certain realty, making a partial payment and giving a note secured by mortgage for the balance. The law relating to this condition is set forth in § 127. The decedent owned the real estate, but the unpaid portion of the contract price is a debt and, like any other debt, must be paid out of the personal property of the estate. Under no circumstances is it to be considered a further investment in real estate. If the other real estate of the decedent was included in the inventory, this should also have been, not at the cost of the equity, but at the appraised value of the property.

Many persons are confused as to the justice of charging against income the interest accruing after the testator's death. They would argue that the persons entitled to the income should not have to pay this interest, as it is not a cost of collecting or handling the income. The law takes cognizance of the fact that if the interest-bearing indebtedness had been paid off, it would in all probability have been from money secured by the

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sale of an income-producing asset, thus reducing the income which would have been distributable. Therefore this interest, by the payment of which other funds are left free to draw income, is charged against income.

§ 601. Payment of Tax on Decedent's Income

The federal and any other income taxes owed on account of the decedent's income before his death are considered a debt as of that time and as such are deductible in determining the amount of the taxable estate. (See § 267.) For this reason their payment is charged to Debts of Decedent (Entry No. 16).

Income taxes against the income of the estate, however, are expense against income, but the federal tax is not an expense deductible in determining the amount of that income for purposes of ascertaining the amount of that tax. The administrator must usually file two federal returns of income for the estate, as no return may cover a longer period than twelve months. The law regarding the federal income tax and the need for the representative making sure that the returns are properly filed and the tax fully paid are shown in Chapter XXVIII.

The tax when paid is a charge against income, and is recorded by the entry:

Expense, Income ..... $.....
    Cash ..... $.....

§ 602. After-Discovered Assets

The entry in the case of after-discovered assets (see § 586) is always (No. 17)

Cash ..... $.....
    Assets Not in Inventory..... $.....

for the amount which is realized if they are sold. If not sold the procedure outlined in § 627 should be followed.

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Entry No. 18 assumes that the Montrose State Bank has called the attention of the executor to the existence in the decedent's name of a savings account of $1,000, not included in the inventory. The interest for the past six months, amounting to $20, must be divided between corpus and income as in the case of other interest income, but since the interest accrued to the date of demise was not included in the inventory, it as well as the principal must be credited to Assets Not in Inventory. The entry is then:

Savings Accounts	$1,020.00	
Assets Not in Inventory		$1,011.67
Income		8.33

§ 603. Gain or Loss on Realization

If an automobile entered on the inventory as being worth $1,000 is sold for $1,200, the following entry (No. 20) is necessary:

Cash	$1,200.00	
Gain on Realization		$ 200.00
Inventory		1,000.00

The same principle must be followed in reference to any sale for other than the appraised value. If this automobile had been sold for $800 the entry would have been:

Cash	$ 800.00	
Loss on Realization	200.00	
Inventory		$1,000.00

In other words—and this should never be lost sight of—the Inventory account must be credited with the inventory value of each asset disposed of, as only in this way will the Inventory account close out with the assets.

§ 604. Payment and Collection of State Inheritance Taxes

As has been said, state inheritance taxes are to be deducted from the amount which would otherwise pass to each heir. A

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deposit of the estimated amount of such taxes may be required by the state in advance of distribution. In the estate under consideration it is assumed that it has been estimated that the tax will amount to about $2,000 and that under the law the administrator is required to deposit this amount, subject to correction when the true amount of tax shall have been determined and assessed.

This payment is shown in Entry No. 23. As it was not a debt of the decedent, existing at the time of the demise, it would be improper to charge its payment to Debts of Decedent. The payment, or so much of it as is properly due to the state, is an advance on the distribution of the assets. Since, however, in our present case there are three equal heirs on whom the inheritance tax will rest equally, there are no complications and the payment of the tax may be charged directly to Distribution of Cash. When the correct amount is determined and the state refunds the difference the entry will be (No. 34):

Cash ..... $.....
    Distribution of Cash..... $.....

In any less simple case than this an Inheritance Tax Suspense account should be opened and the procedure outlined in § 624 should be followed, but the plan above suggested will serve in most administratorships.

§ 605. Payment of Federal Transfer Tax

The federal transfer tax is entered as an administration expense, but since administration expenses are deductible in determining the amount of the federal tax, and the tax itself is not so deductible, it must be borne in mind that, while the tax is entered in that account, it is not subject to the same interpretation as the other entries.

There is one exception to the rule that the tax is considered an expense against corpus of the estate as a whole. If there

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are life insurance policies in excess of $40,000, there is charged to the beneficiaries under these policies that proportion of the total tax which "the proceeds, in excess of $40,000, of such policies bear to the net estate."[8] In this case the entry would be:

Administration Expense (for the amount to be borne by the estate)	$.....	
Distribution of Assets (for the amount to be passed to the beneficiaries)	.....	
Cash		$.....

§ 606. Loss by Theft

If the proceeds of the interest collection shown in Entry No. 25, together with his own funds, had been placed in the administrator's safe until they could be deposited in the bank, and had been stolen therefrom, it would be necessary for the administrator to make an entry:

Loss on Income	$.....	
Cash		$.....

The loss would be charged against income because the money stolen belonged to income and the loss should not fall upon the general assets of the estate. It would be improper for the administrator to allow the books to ignore both the receipt and the theft, because he is chargeable *prima facie* with all the amounts he collects and these must appear on his books.

The distinction between Loss on Income and Expense, Income, is that the former account is used for amounts for the distribution of which the representative receives no commission (see § 196), while Expense, Income, is charged with items for the payment of which he is entitled to his commission.

If the money stolen had been the net balance of miscellaneous receipts and disbursements, some of each against cor-

[8] Revenue Act of 1918, § 408. See also § 327 of this book.

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pus and some against income, it would have been necessary to add the total receipts from corpus and subtract the total disbursements from corpus, and to add the total receipts from income and subtract the total disbursements against income, thus ascertaining the amount of the theft from corpus and income separately. The entry in this case would have been:

Loss on Income	$.....	
Loss on Realization	.....	
Cash		$.....

Loss on Income would be charged with the amount of income cash stolen, and Loss on Realization with the amount of corpus cash.

A theft of inventoried articles not yet realized upon would be shown by the following entry, made whenever the recovery seemed improbable:

Loss on Realization	$.....	
Inventory		$.....

§ 607. Sale of Pledged Assets

The bonds of the Gypsum Valley Company, of the par value of $10,000 and appraised at $9,000, are now sold by the Second National Bank under authority from the administrator to make that sale and satisfy from the proceeds a $6,000 loan secured by these bonds. The bank sells the bonds for $9,500, $6,000 of which it retains, the remaining $3,500 being paid to the executor. The entry might then be:

Cash	$3,500.00	
Debts of Decedent	6,000.00	
Inventory		$9,000.00
Gain on Realization		500.00

In this instance the administrator would in most jurisdictions be entitled to a commission for the sale at $9,500 and for

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paying the debt of $6,000. Since some courts depend a great deal on an analysis of the Cash account for determining the amount of the representative's commission, it is well to let the Cash account show the entire amount on which the commission should be paid. To do this one may make two entries, one for the sale of the stock and one for the payment of the note (Entries Nos. 26 and 27):

Cash	$9,500.00	
Inventory		$9,000.00
Gain on Realization		500.00
Debts of Decedent	6,000.00	
Cash		6,000.00

§ 608. Deferred Expenses

The decedent had paid the interest in advance on the above loan to July 7, 1920, and the amount of interest prepaid from the date of demise to its expiration should have been and was included in the inventory for inheritance tax purposes. This interest has now become an expense against income, to be entered (No. 28):

Expense, Income	$349.68	
Inventory		$349.68

All deferred or prepaid expenses included in the inventory must be so entered upon their expiration. If this note had been paid off before its due date, a refund of the unearned interest having been obtained, the entry would have been:

Cash (for the amount of the refund)	$.....	
Expense, Income (for the amount of prepayment expired)	.....	
Inventory		$.....

Rent prepaid by the decedent would in some states be handled similarly, but the statutes of other states provide that rent is not to be accrued.

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Prepaid insurance is to be accrued as is interest, and charged off in the same way. Entry No. 32 shows the writing off of the proportion of a fire insurance premium unexpired at the time of the decedent's death:

Expense, Income ..... $.....
    Inventory ..... $.....

The administrator receives no commission on such items of expense deferred from before the decedent's death.

§ 609. Deferred Income

In the same way, if any interest had been prepaid to the decedent, the unearned portion of that interest would be a liability and as such a debt of the decedent, a deduction from corpus. The entry upon the books of the estate at the expiration of the period for which the interest was prepaid would be:

Debts of Decedent..... $.....
    Income ..... $.....

The same rule would apply to other items of deferred income except, in some states, rent. (See § 608.) On such items the administrator would be entitled to no commission.

§ 610. Dividends Received

Examples of the manner of showing dividends received appear in Entries Nos. 1 and 29. The first payment is credited to Inventory because, having been declared before the decedent's death, it is a part of the corpus and should be included in the inventory. (See §§ 308, 309.) If it had not been inventoried the credit would have had to be to Assets Not in Inventory. If the incorrect amount had been included in the inventory it would have been necessary to take up the difference through Gain on Realization or Loss on Realization. The dividend shown in Entry No. 29 is credited entirely to Income because it was declared after the demise.

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§ 611. Loss by Bank Failure

Suppose that the Montrose Trust Company, in which the decedent had a savings account of $3,000, plus $60 of interest credited on December 31, 1919, failed.[4] The final settlement of the insolvent bank's affairs being made with a loss of $612 to the estate, the estate books must now show this loss in the following manner (Entry No. 30):

Loss on Income	$ 12.00	
Loss on Realization	600.00	
Cash	2,448.00	
Savings Accounts		$3,060.00

The loss is proportioned between Loss on Income and Loss on Realization as indicated in connection with a loss by theft. (See § 606.)

§ 612. Loss by Fire

All losses are subject to the same general principles. The settlement of a loss by fire is indicated in Entry No. 31, the appraised value of the property destroyed being $5,650. There was in effect a fire insurance policy for $3,000. The loss is entered at the time of the receipt of the payment from the insurance company:

Cash	$3,000.00	
Loss on Realization	2,650.00	
Inventory		$5,650.00

§ 613. Assets Erroneously Included in Inventory

It has been shown (see § 277) that assets which stand in the name of the decedent should be included in the inventory, leaving it to the court to pass finally upon the title thereto. Suppose that in the inventory there were included certain certificates of stock found in the decedent's desk, and assigned

[4] For comment on administrator's liability, see § 96.

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in blank by him, which were claimed by another person who was able to prove that he had bought and paid for them. The court would order the administrator to turn over the certificates to the purchaser, and make on his books the following entry covering the transfer:

Loss on Realization	$.....	
Inventory		$.....

§ 614. Realization of Debts Receivable

Collections of debts due the decedent are credited to Inventory for the amount at which they have been appraised. If a payment is received on account, Inventory will be credited with only the amount received, the balance being held in abeyance. If more than the appraised value of the debt is received, the excess will be handled through Gain on Realization:

Cash (the amount received)	$.....	
Inventory (the appraised value)		$.....
Gain on Realization (the excess over the appraised value)		.....

If less than the appraised value is received and the administrator is in doubt as to the collectibility of the balance, that part may be left in the inventory with the other assets not realized upon, the entry being

Cash	$.....	
Inventory		$.....

for the amount which is received.

If the administrator has to compromise any account to secure settlement (making certain first that his action is tenable), the entry would be:

Cash (for the amount collected)	$.....	
Loss on Realization (for the amount relinquished)	.....	
Inventory (for the appraised value)		$.....

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§ 615. Real Estate Passing Directly

If among the estate assets there is real property which passes directly to heirs-at-law, without coming into the hands of the administrator, this real estate not having been included in the inventory, the books of account need take no note of the transaction. But if such real estate was included in the inventory, it is necessary to credit it out of the Inventory account. The entry should be:

Distribution of Assets Other Than Cash..... $.....
    Inventory ..... $.....

§ 616. Collection of a Mortgage Note

If the decedent had contracted to sell certain real estate, whether title had passed to the vendee, who had given the decedent a note secured by a mortgage for the unpaid balance, or whether title still vested in the decedent at the date of his death, the heir to the real estate receives no interest whatever in the decedent's equity in this property. The asset is considered personal property. The inventory should have shown the amount of money receivable and not any equity in the real estate. The entry for the collection of a mortgage note receivable is, therefore:

Cash ..... $.....
    Inventory ..... $.....

§ 617. Operation and Sale of a Going Business

If the decedent was the individual proprietor of a going business, complications are introduced for the handling of which no uniform rule can be laid down. Of course the assets of the business must be inventoried with the general assets of the estate, but it is always wise to make of them a distinct class in the inventory. If the court instructs the administrator to continue the operation of the business and a good set of books has been kept for this enterprise, these books should

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be closed in the manner which has been followed in the past, bringing down the asset and liability balances, and entering the appraisal as an adjustment to net worth.

At this point the administrator has a choice of two courses: he may elect to continue the keeping of the books of the business as distinct from the general estate books, or he may carry the whole through one set of books. If the business is of some magnitude and has an accounting staff which is able and used to handling the transactions which occur, the former procedure is probably the more satisfactory, as there will be innumerable details which the administrator will not want to deal with and indeed probably could not handle so well as could those to whom the handling of these details has become a routine matter.

If the administrator follows this course he must, of course, provide a suitable check upon the work of those who handle the records. It will usually be necessary for him to tighten up on the methods generally followed in accounting for individual proprietorships. He should require that all receipts be banked, no bills being paid directly out of the receipts. If small payments are necessary they should be made from an "imprest" petty cash fund and properly vouchered.

While for the books of the business any good commercial system of accounting will do, complications arise in connecting these up with the books of the estate. Perhaps the most satisfactory tie is secured by opening on the estate books an account with the business. This would be done by making the entry

Business	$.....	
Inventory		$.....

for the appraised value of the assets of the business. All cash withdrawn from the business would be entered:

Cash	$.....	
Business		$.....

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The payment of debts of the business existing at the decedent's death would be entered as

Debts of Decedent	$.....	
Cash		$.....

and the expenses of operating the business after the demise would be entered:

Business	$.....	
Cash		$.....

Whenever it is desired to make an accounting it will be necessary to reinventory the assets of the business. If possible all the bills incurred for the business should be paid and an entry then made to bring the balance in the account with the business to the amount of the new inventory. If the account with Business showed a debit of $22,000 and a credit of $6,000, the new inventory of the business being $14,000, the entry would be determined as follows:

$22,000.00, debit balance
— 6,000.00, credit balance

$16,000.00, net debit balance
— 14,000.00, true value

$ 2,000.00, loss

and the entry would be

Loss on Realization	$2,000.00	
Business		$2,000.00

This entry would bring the net debit balance of Business account down to the true inventory of $14,000 and would show the loss from operation.

If on the other hand the new inventory showed $18,000, the entry would be determined as follows:

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$22,000.00, debit balance
— 6,000.00, credit balance

$16,000.00, net debit balance
from 18,000.00, true value

$ 2,000.00, gain

The entry would be:

Business	$2,000.00	
Gain on Realization		$2,000.00

If the business had yielded a large amount of cash the books might show:

$40,000.00, credit balance
— 16,000.00, debit balance

$24,000.00, net credit balance

To this we should have to add the new inventory to obtain the amount of gain.

If the books of the business are closed at the same time and on the same basis, a like amount of loss or gain should appear therein and be analyzed in the detailed operating statement of the business.

§ 618. Accounting for Partnership Interests

A partnership is dissolved by law upon the death of a partner, the assets of the partnership passing to the surviving partner or partners, subject to an obligation to dispose of them in winding up the business and to account to the estate of the deceased partner for his share in the partnership property, including the good-will. The administrator is charged with the duty of seeing that the partnership property is wound up and that the surviving partner or partners render to him a proper accounting, but it is unnecessary for him to record in his books

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anything having to do with the realization except what he receives as the decedent's share. He has no authority to interfere with the surviving partner or partners in the liquidation of the partnership business although he has a right to compel the use of proper and fair means in such liquidation.

The interest of the deceased in the partnership venture is of course an asset belonging to the corpus of the estate. It should be appraised with the other assets, in which case any amounts the administrator receives as representing the realization of the decedent's share should be credited to Inventory up to the appraised value of the decedent's interest and after that to Gain on Realization, as the entire amount received is considered a part of the corpus although it may consist in part of profits earned by the surviving partners in the process of liquidating the business. If the amount finally realized is less than the inventory value the difference should be closed out by the entry:

Loss on Realization.....	$.....	
Inventory		$.....

The law of many states permits the inventorying of a partnership interest as of unascertained value. If this is done all that is realized from the interest is credited to Gain on Realization.

Review Questions

1. What is the object of this chapter?
2. What caution is necessary in making entries before appraisal?
3. What classes of expenses can properly be charged to administration?
4. How and when should the decedent's bank balance be entered? What difference may be made for savings accounts?
5. If advances are made to heirs or legatees, how are they entered? If an heir takes over specific assets, how should this transaction appear on the records?

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6. How are funeral expenses entered?
7. How is payment of an outstanding check entered?
8. How is the inventory entered? How would an erroneous entry in the inventory be corrected later on the books?
9. Distinguish between entries for taxes on personal property assessed prior to death and after death.
10. How are taxes on real property entered?
11. How should accrued interest be treated?
12. How is payment of a debt entered?
13. When should interest payable be entered as a debt and when as an expense? Why is all interest accrued after death charged to income?
14. Distinguish between the entries for the payment of income taxes due at death and after-accruing income taxes.
15. What is the entry for an after-discovered asset if sold? If not sold?
16. How should gain or loss on realization be recorded?
17. To what are state inheritance taxes to be charged?
18. To what are federal transfer taxes charged? If part of this tax is levied on "life insurance policies in excess of $40,000," how would it be charged?
19. How would a loss by theft be entered? Why?
20. If pledged assets were sold, how would the transaction be entered? What advantage is there in making two entries of such a transaction?
21. Where expenses have been paid in advance and are carried as assets in the inventory, how should the matter be entered on expiration?
22. If the decedent had received interest in advance, how is that treated?
23. Distinguish between the entry of a dividend declared before death and one declared after death.
24. How would a loss by bank failure be apportioned between income and corpus?
25. How would a loss by fire be entered?
26. What would be the entry for assets erroneously included in the inventory?
27. When debts are paid the estate, what is the entry? If the debt was compromised, how would the transaction be entered? How may the partnership interest be inventoried?

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28. If real estate has been entered in the inventory and then passed to the heir or legatee direct, what entry should be made?
29. Why should assets of a going individual business be made a distinct class in the inventory? What two plans are there to keep the records? What precautions should the representative take when separate books are kept for the business? How would these separate records be tied up with the representative's records? How would losses appear? How would gains appear?
30. In case of a partnership business, what should appear on the representative's books? How is any difference between the appraised value and the realization value shown?
31. What is the entry when a mortgage note receivable is paid?

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CHAPTER LXX

EXECUTORSHIP ACCOUNTING

§ 619. Executor's Accounts Similar to Those of Administrator

Accounting by an executor differs from that by an administrator only to the extent that the recording of the slightly more complex duties of the executor requires more kinds of entries. The fundamental principles are the same for both; the same scheme of accounts is used, and the general form of the final accounting is the same.

Such differences as do exist result from the fact that the executor is operating under a will which probably sets aside specific legacies and may provide for the creation of trusts, whereas the administrator merely realizes and distributes. The final report of the administrator accounts for the distribution of cash, of assets other than cash, and of income. The executor, on the other hand, must account separately for the specific legacies and the general and demonstrative legacies distributed. He accounts in the same way as the administrator for the distribution of income, but if a trusteeship is created he must account for the payments of income cash and corpus cash to the trustee, even if he himself is to perform both functions.

§ 620. Additional Accounts Needed by Executor

To record this additional information, certain accounts are used by executors in place of the Distribution of Cash account, Distribution of Assets Other Than Cash account, and Distribution of Income account of the administrator. These with their uses are presented in the following synopsis:

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Debited With	SPECIFIC LEGACIES DISTRIBUTED	*Credited With*
Appraisal values of specific legacies distributed.		

PAYMENTS ON GENERAL AND DEMONSTRATIVE LEGACIES

All payments of corpus cash and the inventory value of all assets turned over on account of general and demonstrative legacies.	

PAYMENTS OF PRINCIPAL TO TRUSTEE

All payments of cash and the inventory value of all assets turned over out of corpus to trustee.	

DISTRIBUTION OF INCOME

All payments of income cash directly to legatees.	

PAYMENTS OF INCOME TO TRUSTEE

Amounts paid by executor to trustee on account of income.	

The general scheme of accounts differs from that of the administrator only in that payments to legatees on other than specific legacies are charged to Payments on General and Demonstrative Legacies. Payments or deliveries of specific legacies, on which the executor is entitled to no commission, are charged to Specific Legacies Distributed, while payments or deliveries of assets to the trustee are debited to Payments of Principal to Trustee if they will become part of the prin-

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cipal of the trust, or to Payments of Income to Trustee if they are from income.

In closing the books of the executor when an accounting is to be made, the first three of the above accounts are credited with amounts sufficient to balance them, the corresponding debit being to Estate Corpus, and the last two are credited with the amounts necessary to balance them, Income account being debited.

§ 621. General Books Kept by Executors

As with administrators, any form of double-entry records in which the information required may be recorded will be adequate. The separate ledger, cash book, and journal are preferred to the synoptic, which is not so well suited to the accounts of executors because of the number of columns which would be required for the greater number of accounts. A cash journal can be used with great advantage by executors.

§ 622. Payments on Legacies

If the executor is willing to pay to the legatees reasonable advances on their legacies, the estate funds being sufficient and there being no doubt of the estate's solvency, the payments are entered:

Payments on General and Demonstrative Legacies	$.....	
Cash		$.....

The law in reference to paying legacies has been set out in Chapter XVII. Like the administrator, the executor must deduct the state inheritance taxes and pay over only the difference when the legacies are of cash, or collect the tax on the legacy when the legacy is of things other than cash.

Specific legacies are handled differently from others because the executor is not entitled to his commission on them.

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The entry for the transfer of a legacy of assets other than cash is:

Specific Legacies Distributed	$.....	
Inventory		$.....

Specific legacies distributed are entered in the fifth column of the Realization account.

If an after-discovered asset (see § 586) constitutes part of a specific legacy, as a block of Liberty bonds when "all my Liberty Loan bonds" had been bequeathed to a nephew, the executor should appraise it properly (see § 301) and make the entry

Specific Legacies Distributed.....	$.....	
Assets Not in Inventory.....		$.....

for the fair market value of the asset at the time of turning it over.

§ 623. Legatees Ledger

When the legacies not specific are numerous or advances made thereon are likely to be many, it is often advisable to keep a legatees ledger in the general style of any subsidiary personal accounts ledger such as an accounts payable (purchase), or accounts receivable (sales or customers) ledger.

All payments made on other than specific legacies and charged to Payments on General and Demonstrative Legacies account should be posted to the legatees' account in this ledger. The total debits in this ledger will, then, always equal the debit amount of the Payments on General and Demonstrative Legacies account, and this ledger will be subsidiary to that account. The legatees are not credited until the books are closed (see § 629), when Payments on General and Demonstrative Legacies account is credited with the payments made. Even then, if certain legacies or parts of legacies of this type have not

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been paid, the full amount of the legacy will not be credited to the legatees' account. The credit will be the amounts of the payments only. For this reason the titles of the accounts in the legatees ledger should embrace memoranda of the amounts of the legacies.

§ 624. Inheritance and Transfer Taxes

State inheritance taxes are an advance on legacies, whether or not they are to be collected from the individual legatees, because if not so collected they are a deduction from the legacy to the remainderman. Whether such taxes should be charged to Payments on General and Demonstrative Legacies, Payments of Principal to Trustee, or to Specific Legacies Distributed cannot, however, be told at the time of the initial estimated payment, as this cannot be divided among the legatees. Therefore this payment is best debited to Inheritance Tax Suspense until the true amount is ascertained.

When the correct amount of tax has been determined and the state has refunded the difference, if any, the refund will appear as:

Cash	$.....	
Inheritance Tax Suspense.....		$.....

But if the determination of the exact tax shows that more is due than has been paid, the entry of the payment will be made as was that recording the first payment.

When the exact tax has been determined, it is possible to divide the tax and charge it against the proper accounts, viz.:

(1) Payments on General and Demonstrative Legacies	$.....	
Inheritance Tax Suspense.....		$.....
For the amounts which the executor will take as deductions from all except specific legacies.		

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(2) Payments of Principal to Trustee..... $.....
Inheritance Tax Suspense..... $.....
For the amount of tax on the estimated residue which will be given to the trustee, if any.

The balance remaining in Inheritance Tax Suspense account is the amount due the executor from the recipients of specific legacies. Such collections are entered as:

Cash ..... $.....
Inheritance Tax Suspense..... $.....

By these entries the Inheritance Tax Suspense account is cleared.

No part of the tax is chargeable to Payments of Income to Trustee because only property existing at the time of death is taxed.

The payment of the federal transfer tax will be handled as described in § 605.

§ 625. Payments of Income

If under the terms of the will no trusts are created, the only advantages of separating corpus from income are those general advantages mentioned in § 572, and income may be paid out exactly as by an administrator. But since, when a trust is created, the legatee thereof is not the life tenant or the remainderman, but the trustee himself, the only payments on such a legacy which the executor can lawfully make are to the trustee, whether he or another is acting in that capacity. Therefore any case in which the executor pays to a life tenant an advance on income to become due him under the terms of the will is in reality a payment by the executor to himself as trustee, for which he need as executor take no receipt from the life tenant, because the latter has no status in the administration of the estate. As trustee, however, he should take

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credit on his trusteeship books and in that capacity should be properly protected by a receipt from the life tenant. (See § 662.) The entry is:

Payments of Income to Trustee.....	$.....	
Cash		$.....

§ 626. Real Estate Passing Directly

If real estate which is to pass directly to devisees has been included in the inventory, the Inventory account must be cleared of the appraised value of this realty by the entry:

Specific Legacies Distributed.....	$.....	
Inventory		$.....

Review Questions

1. What more than is required of an administrator must an executor account for?
2. What additional accounts will be opened? With what is each of of these accounts debited? How is each of these accounts closed?
3. What books should an executor keep? Why is the synoptic not so well adapted to the use of executors?
4. When is a legatees ledger advisable? To what account is this ledger subsidiary? How is this ledger kept?
5. How are advances on legacies entered? How is a payment of a specific legacy entered?
6. How should payment of a state inheritance tax be entered? Against what accounts is it to be finally charged? When the amounts of tax due from specific legatees are collected, how are they entered?
7. When a trust is created, how should payments of income to a life tenant be charged?
8. What is the entry for a specific devise of realty?

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CHAPTER LXXI

CLOSING THE BOOKS AND PREPARING THE ACCOUNT

§ 627. Preparing to Close the Books

When the representative has realized, in so far as he can, on all the assets of the estate, and has paid all just claims against the estate, he is ready to wind up his transactions before closing his books and rendering his final accounting. He must first gather together and pay all the current bills against him, as those for stationery, accountants' services, attorneys' fees, etc. These transactions involve no principles which have not been discussed, and in order not to overburden the text they are omitted from the set of accounts presented. He must also reduce to the present value any deferred expenses still included in his Inventory account. If insurance, for example, had been prepaid by the decedent for several years and had been included in the inventory, the representative must now make the entry

Expense, Income ..... $.....
    Inventory ..... $.....

for the amount of the prepayment which has expired since the demise. In other words, he must reduce the book value of the asset to its present worth.

If he has discovered any assets not in the inventory, which he has not sold or distributed, he should now make the entry

Inventory ..... $.....
    Assets Not in Inventory..... $.....

for their fair market value.[1]

[1] See §§ 301 and 586. For the handling of such an item on the realization account, see the last entry on Form 27.

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The representative must also satisfy himself that he has settled all inheritance, income, and other tax claims fully, so that no later demands may be enforced against him personally.

§ 628. The Trial Balance

Before beginning to close the books it is wise to make sure that they are in balance. If they are out of balance some account is untrue, and it will be impossible properly to close them until the error is found and corrected. The manner of taking off the trial balance of fiduciary accounts is the same as that of a set of commercial accounts.

In reference to the synoptic we saw (see § 583) that since in every entry we have equal debits and credits, on each page we will have a total of debits equal to the total of the credits, and the sum of the page totals of all the debit columns must equal the sum of the page totals of all the credit columns. Before the totals are carried forward from one page to the next, this test of the entries made should be applied, and no totals forwarded until the page balances. In case readdition does not locate the error, it will be necessary to go over the entries and find out on which line the debits do not equal the credits, until all the needed changes are made and the books are in balance.

From this explanation it will be seen that, although the synoptic may be looked at as a cash journal, it is a complete ledger in itself, because each account shows the ledger balance of that account. Any page balance of the synoptic is a trial balance at that point, and when we are preparing to close the synoptic the final trial balance will be simply the page balance.

The trial balance used for purposes of illustrating the accounting is not that of the administrator's accounts shown in Form 26. It has been drawn from the work of the executor, because of the additional complications usually existing therein, but the same general treatment is followed in the work of an administrator.

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TRIAL BALANCE

Account	Gross Debit	Gross Credit	Net Debit	Net Credit
Cash in Montrose State Bank	$53,314.65	$41,974.89	$11,339.76	
Inventory	152,564.85	70,723.36	81,841.49	
Assets Not in Inventory		1,475.23		$ 1,475.23
Gain on Realization		952.28		952.28
Loss on Realization	4,250.63		4,250.63	
Funeral and Administration Expenses	5,090.52		5,090.52	
Debts of Decedent	15,758.04		15,758.04	
General and Demonstrative Legacies Distributed.	6,000.00		6,000.00	
Specific Legacies Distributed	16,023.28		16,023.28	
Payment of Principal to Trustee.	7,239.05		7,239.05	
Estate Corpus		152,364.85		152,364.85
Income		10,132.69		10,132.69
Loss on Income...	750.00		750.00	
Expense, Income..	2,332.28		2,332.28	
Payments of Income to Trustee.	4,000.00		4,000.00	
Savings Accounts.	10,300.00		10,300.00	
Inheritance Tax Suspense	8,346.27	8,346.27		
Totals	$285,969.57	$285,969.57	$164,925.05	$164,925.05

§ 629. Balancing the Subsidiary Records

At this point it is necessary to balance the subsidiary records. The total of the General and Demonstrative Legacies Distributed account must equal the total of the payments charged to the legatees on the legatees ledger. (See § 623.)

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This amount must also equal the sum of all the general and demonstrative legacies except those to the trustee, unless some legacies have not been paid, in which case the difference will be the amount of those which have not been paid. If these qualities do not appear there is an error in addition or there has been a failure to enter the same figure to the legatees ledger as was entered in the original record.

The net debit to the Inventory account (the difference between the total debits and the total credits) must equal the appraised value of all the assets which are still unrealized upon,[2] as shown in the Realization account, and the Realization account must itself balance. (See § 585.) If this test fails and the error is not one of addition it is due to a failure to credit Inventory account with the *appraised* value of some asset which has been disposed of.

§ 630. Reconciling the Bank Account

Ordinarily the balance on deposit according to the statement furnished by the bank or the balance brought down in the pass-book will be greater than the balance shown in the depositor's books of account by the amount of the checks issued but not yet presented at the bank for payment. If this is not true, the error is due to:

1. Failure on the part of either the bank or the depositor to enter correctly the amount of some deposit or check.
2. Failure on the part of the depositor to deposit some receipt.
3. Failure on the part of the depositor to enter in his books some charge (for collection, interest, etc.) made by the bank against his account.
4. An error in addition or subtraction on the part of the bank. If the depositor's own general books are in

[2] Including any after-discovered assets not sold or distributed. See §§ 586, 627.

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balance the error could not have been one of addition or subtraction made by him unless he has made a compensating error, i.e., an equal error in the other direction.

All the above reconciliations must appear before the account can be properly prepared. If there is an error it must be found and corrected.

§ 631. Preparing the Closing Entries

The closing entries can best be made in connection with the preparation of the various schedules of the final accounting. When we outlined our system of accounting for estates (see § 570), we planned to have an account for each group which would have to be handled separately in the accounting for the court. Form 28 shows the final accounting of the estate whose before-closing trial balance is shown in § 628 above. An examination of this form will show us that the groups are as follows:

Inventory.
Realization of Assets Not in Inventory.
Gain on Realization of Appraised Value.
Loss on Realization of Appraised Value.
Specific Legacies Distributed.
Items in Inventory Undistributed.
Funeral and Administration Expenses Paid.
Debts of Decedent Paid.
Payments Made on General and Demonstrative Legacies.
Payments of Principal to Trustee.
Cash on Hand.
Income Received.
Expense Against Income.
Loss on Income.
Payments of Income to Trustee.

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These are the accounts whose uses we have been examining. The summary, schedules, and closing entries may now be prepared together, in the manner described in the following sections.

§ 632. Debits on Account of Corpus

As the executor must distinguish his receipts and disbursements between corpus and income, the summary is divided into two parts, one for corpus and another for income. The first of these is for corpus. In starting this, the six-column schedule (see § 585 and Form 27), on which we have been keeping a record of the realization of our inventory, may be put to excellent use. The total of the first column, down to the end of the appraisal as filed, is the amount of that appraisal, and is entered as the first item in the summary. (See Form 28, "Account of Proceedings.")

The after-discovered assets sold and on hand are shown in the remainder of the first column, the total of which becomes the second item in the summary. When this amount is recorded, the Assets Not in Inventory account, which will show the same total, may be closed out by the first of the closing entries:

Assets Not in Inventory	$1,475.23	
Estate Corpus		$1,475.23

The fourth column of the Realization account represents the other debit to the executor, and when its total is entered as the gain on realization of appraised value, the Gain on Realization account is closed out:

Gain on Realization	$952.28	
Estate Corpus		$952.28

The total charges to the executor on account of corpus are then the sum of the credits in the Estate Corpus account.

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§ 633. Credits from the Realization Account

Three of the credits in our summary of the corpus are also taken from the Realization account. From the third column we obtain the amount of loss on realization of appraised value, and having entered it we may close the Loss on Realization account by the entry:

Estate Corpus	$4,250.63	
Loss on Realization		$4,250.63

The next item in the summary is the appraised value of the specific legacies which have been distributed. Its amount is shown by the fifth column of the Realization account and by the Specific Legacies Distributed account on the synoptic or general ledger. When this total has been entered on the summary the ledger account may be closed by the entry:

Estate Corpus	$16,023.28	
Specific Legacies Distributed		$16,023.28

The summary next shows the undisposed-of balance of the inventory, including any after-discovered assets not sold. This figure is the total of the sixth column of the Realization account and is the balance in the Inventory account on the synoptic. The Inventory account, which is a balance sheet item, is not closed out.

§ 634. Schedule A—Realization of Assets

To prepare Schedule A, simply have a copy of the Realization account made with the proper heading, Schedule A, Realization of Assets. This should be prepared on a sheet so arranged that there is a space to the right of the figures sufficiently wide to enter the various explanations called for, such as manner of sale, reasons why various assets have not been sold and debts not collected, and details as to loss by accident, such as theft and fire, etc.

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By keeping the Realization account during the progress of administration we have avoided at the time of winding up the estate the tedious work of digging out the information needed for the schedules, and have so arranged our work that the most important of our schedules is prepared for us in the very keeping of our books. In fact, it may be said that the first five of our schedules are prepared for us by our method of keeping our accounts, for under the plans suggested by earlier writers separate schedules are required for each of the five items combined in our Schedule A.

§ 635. Other Corpus Credits

The other corpus items for which the executor takes credit in the account are shown in the schedules listed below (see Form 28):

Schedule B, Funeral and Administration Expenses.
Schedule C, Debts of Decedent.
Schedule D, Payments on Legacies.
Schedule E, Payments of Principal to Trustee.

These schedules are easily prepared from the entries on the synoptic or general ledger, being, in fact, merely copies of the accounts with the necessary explanatory matter. The form in which they are written is largely a matter of personal preference.

These accounts should then be closed on the books by the following entries:

Estate Corpus	$5,090.52	
Funeral and Administration Expenses...		$5,090.52
Estate Corpus	15,758.04	
Debts of Decedent		15,758.04
Estate Corpus	6,000.00	
General and Demonstrative Legacies		6,000.00

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Estate Corpus	$7,239.05	
Payment of Principal to Trustee		$7,239.05

For the closing, four journal entries are preferred to a compound entry because the result of the separate entries is that the Estate Corpus account now contains the summary of the executor's account in so far as corpus is concerned. The credit balance in the Corpus account after these entries have been made is the value of the inventory and corpus cash on hand.

In closing the summary as to corpus the reader will notice that the total of the credits is carried over and deducted from the total of the debits. The difference is the amount of corpus cash.[8] The balance remaining in the inventory per the books and Schedule A (sixth column) is then entered on the summary again and added to the amount of corpus cash, for the reason that since the executor has taken credit by Schedule A for the inventory unsold, he must now charge himself with it because it constitutes part of the estate assets remaining on hand, from the responsibility for which he has not been released.

§ 636. The Income Summary

The debit against the executor on account of income is the amount of the credit to Income account. The items making up this amount are copied with the necessary explanations in Schedule G.

The credits which the executor takes are listed in:

Schedule H, Expense Against Income.
Schedule I, Loss on Income.
Schedule J, Payments of Income to Trustee.

These schedules are virtually transcripts of those ac-

[8] This figure cannot be obtained from the books at this time.

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counts, which on the books are then closed by the following entries:

Income	$2,332.28	
Expense, Income		$2,332.28
Income	750.00	
Loss on Income		750.00
Income	4,000.00	
Payments of Income to Trustee		4,000.00

The Income account on the books will then show the amount of cash belonging to income in the hands of the executor, which amount should also be the difference between the income with which the executor has charged himself on the summary and the charges against income with which he has credited himself.

§ 637. Reconciliations

The closing entries have now been made on the books and the balances are brought down. It is well at this point to make certain that the necessary reconciliations, most of which have been spoken of above, exist:

1. The two amounts of cash shown on the summary, i.e., cash on hand belonging to corpus and cash on hand belonging to income, must equal the total of the balances in the various cash accounts on the books.

2. The amount of the Estate Corpus account on the books is the amount which the summary shows to be still charged to the executor on account of corpus.

3. The amount of the Income account on the books is the amount which the summary shows to be still charged to the executor on account of income.

4. The sum of the balances in the Estate Corpus and Income accounts on the books equals the sum of the balances in the Inventory and the various cash accounts, and equals the

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total amount with which the executor remains charged by the summary on account of both corpus and income.

§ 638. Decree of Distribution

The executor is now ready to present his accounting to the court and have official approval of his stewardship given in the form of a decree of distribution. Of course in states which prescribe by statute the arrangement or the form in which the schedules are to be prepared, the law will have to be followed, but the general principles set out above will apply.

The sections which follow show the entries needed to record the transactions resulting from the decree of distribution.

§ 639. Expenses of Accounting

An allowance to the executor for the expense of rendering his account is made by the court at the time of the accounting and consequently the amount cannot be included in the account itself as a disbursement already made by the executor. The law usually fixes certain amounts to be allowed and the court has some discretion in making further allowances.

Before the closing of the books this would have been an administration expense, but since there are so few entries to be made at this stage, the nominal accounts are not reopened. This payment is accordingly debited directly to Estate Corpus, since it is a deduction from the corpus. The entry is:

Estate Corpus	$.....	
Cash		$.....

§ 640. Executor's Commission

The law governing the allowance of commissions has been discussed in § 196. At the time of rendering the decree of distribution the court awards the representative his commission. The commission thus allowed must be prorated between corpus

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and income in the ratios that the amounts on which the receiving and distributing commissions on account of principal and income are computed bear to the total of both, but in the computing of commissions, corpus and income must be considered together, because in states in which the commission is payable on a sliding scale, the first amounts being at higher rates, the computation of the commissions would otherwise be excessive.

For the same reason that we did not reopen any corpus expense accounts we do not reopen the Expense, Income account, and the entry is made as a debit direct to Corpus and to Income:

Estate Corpus	$.....	
Income	.....	
Cash		$.....

§ 641. Interest on Legacies

The interest on legacies which was allowed by the decree of distribution is a proper charge against income because the income has been increased by the executor's retention of cash which should have been paid to the legatees at the expiration of one year from the issuance of letters testamentary, the date upon which the executor may begin to pay legacies. The entry is, then:

Income	$.....	
Cash		$.....

§ 642. Final Distribution as Executor

After allowing the above items the decree of distribution awards the balance of the corpus and income to the trustee. The assets other than cash form a part of the residue of the estate and become principal of the trust because they were in existence at the time of death. The inactive bank accounts may include accretions of income from interest accrued after

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the date of death, but it is not necessary to divide the inactive bank accounts by paying to income out of them such part as represents interest and paying the balance to principal, unless there are insufficient funds in the general account to meet the amount remaining in the Income account.

The final entry showing the transfer of the remainder of the assets of the estate to the trustee is made as follows, the amounts being the balances in each account:

Income	$.....	
Estate Corpus	.....	
Cash		$.....
Inventory		.....

There is now no balance in any account and the books should be ruled off as finally closed. The executor should present to the court vouchers showing that he has made the final distribution directed by the court and should have his executor's bond canceled. If he has been named trustee also, he assumes his duties in that capacity, entering into entirely new relations with the court and the beneficiaries under the trust. As trustee he should open a new set of books.

Review Questions

1. What must be done preliminary to closing the books? How are any deferred expenses reduced to their present value?
2. How is the synoptic kept in balance?
3. What subsidiary records must be balanced?
4. How is the bank account reconciled?
5. How are the closing entries best prepared?
6. How are the debits for corpus obtained?
7. How are the credits for corpus obtained? Why is the Inventory account not closed?
8. How does the realization account facilitate the preparation of the schedules?

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9. What are the other corpus items for which the executor is to be credited? How are the accounts showing these credits to be closed?
10. What items make up the debit against the executor on account of income? Where are the credits obtained?
11. What reconciliations should be made?
12. If the accounting of the executor is approved by the court, what follows?
13. To what is the allowance for expense of accounting charged? What is the entry?
14. How is the executor's commission computed? How is it prorated between corpus and income?
15. When is interest allowed on legacies? Against what is it charged?
16. What is done with the balance of corpus and income in this case? What are the closing entries? What should the executor do to terminate his office?

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CHAPTER LXXII

PRINCIPLES OF TRUSTEESHIP ACCOUNTING

§ 643. Preliminary Matters

The first duty of a testamentary trustee on taking over the assets of an estate is to examine the accounts of the executor sufficiently to satisfy himself that he is receiving all of the assets to which he is entitled. Immediately thereafter he should have transferred to his name as trustee all registered bonds, notes, and certificates of stock. The new issues or changed record should be in the name of "..... ....., Trustee for Estate of....." or "Estate of....., ... Trustee." If there are two or more trustees the transfers should be to the names of all.

The trustee should see that adequate insurance is carried and should make certain that all taxes assessed against the estate assets have been paid so that the carelessness of someone else may not reflect on him.

It is necessary for him to study the investments of the estate, ascertaining that they are all proper investments for a trustee. It devolves upon him to be certain: first, that the investments are secure, so that the principal of the trust may be preserved safely for the remainderman, and secondly, that they are productive, so that they will yield the current rate of interest to the tenant.

If there is an unnecessary amount of uninvested cash the trustee should invest it as soon as possible. He will be liable for interest on uninvested funds for any period during which he was not functioning as fully as he should have been

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§ 644. Trustee's Duties Less Involved Than Executor's

The duties of the trustee are less varied than those of the executor. The functions of the executor include the realization of the cash value of the assets and the payment of debts owed by the decedent as well as the care of the assets and the distribution of the legacies, but the trustee's duties are in general only the care of assets and the division of income. They have already been discussed in detail. (See § 411.) Briefly they include the:

> . . . power to demand, receive, and sue for the trust property, for any income accruing on it, to invest the funds and lease the real estate; to take proper measures to keep the real estate repaired and insured, to defend suits against him in respect to the property, or against him as trustee; to disburse and distribute the property.[1]

The general principles laid down for the accounting of administrators and executors must be followed by trustees, and this chapter will not repeat what has been said in earlier chapters, but will simply call attention to the differences resulting from the fewer complications in the activities of trustees.

§ 645. Principal and Income of Trusts

The trustee takes over the corpus of the estate from the executor. During trusteeship this corpus is called the "principal." The same general principles apply to the division of trust funds between principal and income as have been set out in connection with the work of the administrator and executor. (See Chapter XXXV.) The problems of classification are not nearly so frequent or so difficult in the case of the trustee.

§ 646. Sale of Capital Assets

Perhaps the most confusing of the questions which arise is that having to do with profit or loss on the sale of capital

[1] Loring, A Trustee's Hand Book (3rd ed.).

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assets. In administratorship and executorship accounting we called these items "gain on realization" and "loss on realization." Realization is not one of the functions of the trustee, who is supposed to receive the estate from the executor fully realized except for such investments as are permitted to trustees.

It will, however, at times be necessary for the trustee to sell certain of the estate assets because they have ceased to be secure investments, because they no longer yield an adequate return, or for some other reason. These sales will seldom be made for the valuation at which the assets were carried in the inventory of the estate in case they were turned over to the trustee by the executor, or for exactly their cost to the trustee if he purchased them. Gains and losses of this type are not income or a charge against income.[2]

The theory (see § 312) is that in the case of inventoried assets it is not a certain amount of money which makes up the principal but the assets themselves for whatever they are worth, and that in the case of assets purchased by the trustee and later resold by him, the increment or loss is an increase or decrease in the principal of the trust rather than an item of income or a reduction of income resulting from the normal course of investment. The general rule is that any unusual or extraneous gain or loss, other than the usual yearly income and charges against that income, falls to the principal of the fund.

§ 647. Betterments, Repairs, and Replacements

Expenditures for repairs which are necessary to maintain property in its previous condition are chargeable to income, but repairs and additions which increase the usefulness or the value of property are charged to principal. This rule is not

[2] In this connection it is well to remember that income from the standpoint of the division of funds between a tenant and a remainderman is not necessarily the same as income from the standpoint of the existing income tax law. (See also § 315.)

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always easy to apply, but it has been interpreted as meaning that "where repairs improve the property to the extent of their cost, they are chargeable to principal and are a judicious investment of the trust funds." [8] In other words, any cost which actually adds to value—which is for a real improvement or addition rather than for merely a repair or a replacement—is a proper charge against the principal.

§ 648. Paying Off Encumbrances

Just as the trustee does not have the duty of realizing on the estate assets but will, under certain circumstances, sell some of these assets, so there are exceptions to the rule that he does not ordinarily have the duty of paying debts of the decedent, which is one of the principal functions of the executor. Some of the property turned over to the trustee may have been pledged or mortgaged and it may eventually devolve upon the trustee to discharge this debt. Such a payment is a charge against the principal, but all interest on the mortgage is chargeable to income.

If the trustee is required to discharge an involuntary encumbrance, such as an assessment for street improvements, the cost is divided between income and principal. Sometimes the entire amount is charged to principal at the time of payment and income is charged with interest thereon annually thereafter. Sometimes the interest is funded and charged to income in a lump. If the tenant and remainderman are beneficiaries of the same fund the principal is paid out of the corpus, the life tenant losing the interest and the remainderman the principal. (See also § 314.)

§ 649. Expenses

Taxes are chargeable against income with the exception that in some states taxes assessed on vacant land are charged

[8] Loring, A Trustee's Hand Book (3rd ed.).

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against the principal. Insurance premiums are generally chargeable against income by the terms of the trust instrument, and this practice is usually followed where there are no definite provisions. But recoveries on account of fire losses are principal. In the case of a partial loss they are generally used in meeting the expense of repairs. If there is a total loss, the fund is invested either in rebuilding or in some other proper manner.

The trustee's commission is usually a percentage of the gross income collected and is charged against income. Additional allowances where extra work is necessary, as for example in the sale of real estate, are charged to the principal when such services are primarily beneficial to the fund, or they may be apportioned equitably. A broker's commission in the purchase or sale of real estate is considered part of the purchase price or a deduction from the sale price, and is consequently a charge against principal.

> The same reasoning would seem to apply to the purchase of stocks and bonds, [but] broker's commissions on change of investments, where it was expressly provided that all expenses were to be charged to income, were properly classed as expenses and charged to income.[4]

Entries Nos. 5, 6 and 7 on Form 29 show the entering of commissions as a reduction of the selling price and as an addition to the cost.

§ 650. Fewer Accounts Needed by Trustees

The accounts used by the executor were:

Cash
Inventory
Assets Not in Inventory
Gain on Realization

[4] Loring, A Trustee's Hand Book (3rd ed.).

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Loss on Realization
Funeral and Administration Expenses
Debts of Decedent
Specific Legacies Distributed
General and Demonstrative Legacies Distributed
Payments of Principal to Trustee
Estate Corpus
Income
Loss on Income
Expense, Income
Payments of Income to Trustee

Of these we see at a glance that we may eliminate a number. We shall no longer need the accounts for the distribution of legacies and payments to the trustee. Any encumbrances which exist against the estate property and are paid off by the trustee will be so few in number that there will be no use in opening an account with Debts of Decedent for them. These payments may be charged directly to Principal.

In the same way, any gain or loss realized on sales of estate assets, instead of being first entered to Gain on Realization account or Loss on Realization account, may be entered directly to the credit (if a gain) or to the debit (if a loss) of Principal. Should it happen that any estate assets not included in the property administered come into the hands of the trustee, they also might be credited directly to Principal instead of being carried through Assets Not in Inventory.

Since the expenses against income will be comparatively few, it is not considered necessary to open a separate account for this purpose. Such expenses and items of loss on income are charged directly to the Income account; charges of the same nature which apply against the principal are charged directly to Principal.

When the books of the executor were closed the assets

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were included in the two accounts of Cash and Inventory. (See § 642.) These were offset by the two net worth accounts of Income and Corpus, the amount of income cash being represented by the balance of the Income account and the sum of the corpus cash and other corpus assets by the balance of the Estate Corpus account. These four accounts are all of the executor's accounts which we have not eliminated as being unnecessary for the trustee. In other words, the accounts of the trustee are generally kept without the use of analytical income and expense accounts.

But in the accounts of trust companies as opposed to individual trustees, because of the great number of assets of each kind handled, the handling of the asset accounts is simplified if they are somewhat broken up. (See Chapter LXXV.) The ordinary subdivisions are Cash, Notes and Mortgages, Stock and Bonds, Real Estate, and other assets. The same subdivision is made in the trust ledgers. (See § 656, "Form of Records.")

§ 651. Must Account Separately for Each Trust

It is necessary for the trustee to account separately for each of the various trusts for which he acts. This does not mean for the various estates alone, as in one estate there may be several trusts. A will may provide for any number of the different kinds of trusts outlined in § 306. There may be a trust fund of a certain sum the income from which is to be paid to one or more persons for a period of years or until the happening of a certain contingency, such as the marriage or death of the tenant or some other person. It may be provided that at the expiration of the trust the principal shall be given to the tenant (except, of course, if the trust terminates with the death of the tenant), or to some other person, or that it shall be divided among several persons in a specified proportion, or revert to the general principal of the estate. Each

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amount of money or other property set aside constitutes a separate trust.

§ 652. Suppositious Case

Let us suppose that the will of James C. Dawson creates the following trusts:

1. Income from $40,000 for a period of twenty years to be paid to the trustees of Butler University for certain uses set forth; principal at the end of that time to revert to the undivided estate.

2. Income from $100,000 to be paid to donor's sister, Mrs. Janet Dawson Reeves, donee, during her life; principal to be paid over to grantees as directed by her will.

3. Income from $100,000, said payments of income not to exceed $5,000 in any year, to be given to donor's sister-in-law, Mrs. Mary Allen Dawson, during her life, any excess in income above $5,000 in each year to become a part of the principal of the undivided estate; the principal of this trust fund to pass upon her death to her children by donor's brother *per stirpes.*

4. "I instruct my executors and trustees to pay to my cousin, Henry G. Dawson, annually during his natural life, but not for longer than twenty years, the sum of $2,400 from the income of my undivided estate, in such instalments as shall seem to them desirable." Strictly speaking, this provision does not create a trust because no definite amount is set aside to produce the specified annuity.

5. Income from balance of estate to be accumulated in trust for twenty years, trustee to disburse such sums as are necessary to maintain and educate donor's children during that time and at the end of that time the principal and income to be divided between them *per stirpes.*

The manner of handling the transactions for these five trusts will be discussed in the next chapter.

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§ 653. Trustee's Reports to the Court

The statutes of practically all of the states require a testamentary trustee to file an inventory soon after his appointment. Further reports are required at intervals thereafter, most states requiring them annually. They must accomplish the same purpose as the accounting rendered by the administrator or executor. To this end they consist of a general statement of all transactions, fully supplemented by detailed schedules. These reports are discussed in detail in Chapter LXXIV.

The courts of the different states use various methods of satisfying themselves of the accuracy of the trustee's reports before they are allowed. Should they contain errors which are not discovered, or should they be latently obscure, the trustee will in all probability be the loser. The beneficiary is always given the benefit of the doubt.

§ 654. When Executor Is Also Trustee

Writers differ somewhat as to the advisability of keeping separate sets of books where one person is both executor and trustee. One of them prescribes a two-column cash book for the purpose of separating executor's cash from trustee's cash, but states that "it is useless trouble for the executor to keep a separate set of books for the trusteeship." The consensus of opinion is that because the utmost care should be exercised to preserve intact the trust funds and to keep distinct the trust transactions, and because usually the executorship is concluded before any substantial transactions on account of the trusteeship occur, it would seem advisable to open a separate set of books for the trusteeship, even though this course might necessitate the running of two sets of books during a small part of the time. There is, of course, no objection to carrying the trustee's accounts in another part of the same book with the executor's if the ruling will serve the purpose, nor to using the same loose-leaf binder when that system is employed.

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Review Questions

1. What are the first matters to which a trustee should attend? What two things should he ascertain as to the investments?
2. How do a trustee's duties compare with those of an executor?
3. What is the estate in a trustee's hands termed?
4. How is gain or loss on a sale treated in a trustee's accounts? What is the distinction made between regular income and charges and extraneous gains and losses?
5. When should repairs be charged to income and when to principal?
6. To what should a payment of interest on a mortgage be charged? If this mortgage itself was paid, to what would it be charged? What would be the entries if an assessment for permanent street improvements were paid by the trustee?
7. How are taxes charged? Insurance? The trustee's commissions? A broker's commission? How are recoveries for fire losses credited?
8. Why are fewer accounts needed by trustees than by executors? Why are the entries simpler?
9. Why must there be a separate set of accounts for each trust?
10. Are all the trusts outlined in § 652 legal in your state?
11. What reports are required by a trustee in your state?
12. Why is it better for the trustee's accounts to be distinct from the executor's?

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CHAPTER LXXIII

KEEPING THE TRUSTEES' ACCOUNTS

§ 655. No Need for Complicated System

The accounting needs of the trustee are, as has been shown, very simple. This being the case, there is no reason for anything other than the simplest of systems in keeping a record of his transactions. Trust companies generally have come to realize this fact, but writers on accounting have seemed to prefer to develop a maze of theoretically perfect convolutions rather than to avoid all possible turns.

The accounts of the trustee, like those of the administrator and executor, should be kept in such a way as to facilitate the preparation of the reports to the court. The plan which is here suggested, and which has been found entirely successful in practice, offers a means whereby the reports to the court are easily prepared. From this record trust companies using similar systems mail statements of the accounts to the beneficiaries of the trusts. These statements are prepared by a stenographer by simply copying the ledger pages of the particular trust. In this way no expensive time is required in drawing off such reports. In fact the Northern Trust Company of Chicago, instead of preparing any statements with typewriter or with ink, has photostat copies made of its ledger pages and mailed to the persons interested.

This form of record furnishes a clear and continuous tabulation of the trustee's dealings, and insures care in the trusteeship.

In addition, the account is always an answer to those troublesome people who are born or married into families,

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and commence a disturbance because they do not find so much money as they expected, or because the trustee has offended them (very frequently by declining to commit a breach of trust). . . .

If a detailed cash account be required . . . it is readily made up from the statement, and all the usual interrogatories may be readily answered. . . . It enables the trustee to furnish the materials for a complete release, and further to bind the beneficiaries by obtaining their signatures to the detailed accounts. . . . It ensures the receipt of all income, and its proper distribution among the persons entitled to it, and guards against any waste of principal through inadvertence.[1]

§ 656. Form of Records

The most satisfactory way of keeping the accounts of a trustee has been found to be by the use of a synoptic as in Form 29. It will be seen that this shows only the four accounts essential for the trustee, namely, Cash, Investments, Principal, and Income. These four accounts on the synoptic cover the estate as a whole in its relations with all the trusts.

Each of these four accounts of the entire estate serves as a control for the same account of each of the individual trusts, and it is necessary to post each item on the synoptic to a subsidiary record known as the trust ledger. (See Form 30.) This subsidiary ledger is in the same form as the synoptic, and contains an account with each of the trusts. It contains also an account with the undivided principal. This last account is used for all property not specifically divided among the different trusts, for any undivided property which is held to guarantee an annuity and for the residue of the principal of the estate left after providing for all trusts created in the will.

§ 657. Opening the Books

Let us suppose that the trial balance of the books of the executor of this estate after distribution was as follows:

[1] Caldicott, Executorship Accounts.

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Account	Debit	Credit
Cash	$ 17,000.00	
Inventory	563,000.00	
Estate Corpus		$579,800.00
Income		200.00
	$580,000.00	$580,000.00

Specific assets or specific sums of money have been set aside by the executor to form the trust funds. As there can never be a trust without a trust fund, the testamentary trustee, whether he is the executor or some other person, cannot assume his duties until the executor as such has specified and set the funds aside. Before making his opening entries the trustee must know what assets are set aside for the various trusts. With this information, he makes a separate entry for each trust, in the following form

Investments ..... $.....
    Principal ..... $.....

with a detailed explanation as shown on Form 29, Entry No. 1. The valuation used must be that of the original inventory filed by the executor and approved by the court.

If any cash is included in the trust fund his entry will be (No. 2):

Cash ..... $.....
Investments ....
    Principal ..... $.....

He proceeds in this way until he has entered all the specific trust funds (see Entry No. 3), and then for the balance of the assets he makes Entry No. 4:

Cash ..... $.....
Investments ....
    Principal ..... $.....
    Income ....

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§ 658. Posting to the Trust Ledger

It then becomes necessary for the trustee to open his trust ledger. This he does by posting each item to the same column on the account of the particular trust which it affects, inserting a check mark or a folio number in the folio column of the synoptic. The folio number is preferable to a check mark. In using loose-leaf records [2] it is customary to give each separate trust a number, which appears on the ledger page of that trust and is used in the folio column of the synoptic.

The folio number of the synoptic page from which the posting is made should be entered on the proper page of the trust ledger.

Although at first glance it seems to involve a large amount of extra labor, it is generally considered time-saving in the end to copy the full explanation of the entry from the synoptic to the page of the trust ledger on which the entry is posted.

If there is only one trust the keeping of the trust ledger will not be necessary, the synoptic becoming the trust ledger as well as the general ledger.

§ 659. Investment of Cash

When the trustee invests any part of the balance of cash which is lying idle, whether this cash is a part of the corpus which was turned over to him by the executor or has come into his hands as a result of the sale of assets, or whether it is income which has been collected by him and is not to be immediately distributed, it is necessary for him to make the following entry (No. 5):

Investments	$.....	
Cash		$.....

This entry, as in the case of all the others, must be posted to the trust ledger.

[2] Prohibited for trustees in some states.

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§ 660. Sale of Assets

Let us suppose that the trustee for certain reasons and with the approval of the court decides to sell some of the securities which have been set aside for the Mary Allen Dawson trust. These must be credited to Investments account at the valuation at which they entered this account, which (see § 646) will be the valuation at which they were carried in the original inventory of the estate if they were included in that inventory, or the cost, if they were purchased after the decedent's death. The effect of this entry will be to make the books show that the securities set aside for this fund have been reduced in amount by that valuation, no matter what the cost.

If the securities were sold at a profit the entry will be (No. 6):

Cash (the amount received)	$.....	
Investments (the inventory value or the cost)		$.....
Principal (the profit)		.....

If a loss resulted from the sale the entry will be (No. 7):

Cash (the amount received)	$.....	
Principal (the loss)	.....	
Investments (the inventory value or the cost)		$.....

It is vital to remember that Investments account must be credited at all times with the same value for an asset sold that was used when the asset was first entered in the account, just as the administrator and executor (see § 603) found it necessary to credit Inventory account with the inventoried value of each asset realized upon.

The postings of the above entries to the trust ledger will serve to bring out the effect on the individual trusts of profit or loss on sales. The trusts are enriched or made poorer by such sales, no part of the gain or loss appearing in Income.

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§ 661. Receipts and Disbursements of Income

When income is received from interest, dividends, rents, etc., the entry will be (No. 8):

Cash	$.....	
Income		$.....

Like all other entries in the synoptic, this must be posted to the proper account in the trust ledger.

Payments of income to the tenants under the will are entered as follows (No. 9):

Income	$.....	
Cash		$.....

The provision of the will (see § 652) under which Mary Allen Dawson receives income from the trust fund of $100,000, "said payments of income not to exceed $5,000 per annum," creates an indefinite annuity. Income from this fund is, of course, credited to Income account. Payments to Mrs. Dawson, limited to $5,000 annually, are charged to Income account.

Since the will directs that the excess income over $5,000 is to be transferred to the principal of the undivided estate, it is necessary at the close of each year to record this transfer on the books. Suppose that the gross income for the year was $6,230, of which $1,000 was used for expenses, leaving a net income of $5,230. In this case the following entries (Nos. 12 and 13) are needed

Income	$230.00	
Cash		$230.00

and

Cash	$230.00	
Principal		$230.00

The first of these entries is posted to the Mary Allen Dawson Trust account in the trust ledger and the second to the Undi-

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vided Estate account. The first indicates the payment of the money from the Mary Allen Dawson trust to the undivided estate; the second records the receipt by the undivided estate of the money from the Mary Allen Dawson trust, as was provided in the will.

If the will had not provided for this transfer of the excess over $5,000—in other words, if that excess had been accumulated to form a part of the principal to pass with the remainder of this fund to Mary Allen Dawson's children by the donor's brother—no such entry would have been necessary. The balance not distributed would have been accumulated in the Income account of this trust.

If the will had directed that the excess income over $5,000 be disposed of by payment to someone else, such payments also would be entered in the form of

Income ..... $.....
    Cash ..... $.....

It is provided in this will that $2,400 annually is to be paid out of the income from the undivided estate to Henry G. Dawson and that such other sums as are necessary from the income of the undivided estate be paid for maintaining and educating the donor's children. These payments will be recorded as are any other distributions of income:

Income ..... $.....
    Cash ..... $.....

§ 662. Payments of Income to Trustee by Executor

It has been pointed out (see § 625) that any advances of income made by a trustee, while still acting as executor, to tenants under the will must be considered as payments of income to the trustee since the tenants have no standing during the period of executorship. If such advances have been made, their recording will necessarily have to show as the first

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entries on the trustee's books. The record of each such advance will require two entries, as follows:

(1) Cash	$.....	
Income		$.....
To record the receipt from the executor of income from..... trust fund, which income is being advanced to ....., the tenant under that trust.		
(2) Income	.....	
Cash		.....
To record the paying over of the above advance on income.		

These entries will have to be posted to the proper account in the trust ledger and the transactions must be included in the trustee's report.

§ 663. Expenses

The payment of any expenses which are proper charges against income (see § 649) may be entered as follows (Entry No. 10):

Income	$.....	
Cash		$.....

Any disbursements which are charges against the principal of the estate will in the same way be entered:

Principal	$.....	
Cash		$.....

§ 664. Investment of Income

The will which we are considering provides that out of the undivided estate a certain annuity shall be paid and that such sums as are necessary shall be expended for the maintenance and education of the donor's children. The income received in excess of these needs must be kept invested by the trustee

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and must not be allowed to lie idle. Any purchases of securities or other assets with the money thus made available will be entered on the books as follows (No. 11):

Investments	$.....	
Cash		$.....

It will be noticed that this entry does not affect Income account but simply shows the exchange of an asset of cash for an asset of investments. The books still show the amount of income which has been earned and has not been distributed.

When these income investments are sold, any profit would be a credit to Income account instead of to Principal and any loss would be a debit to Income account.

§ 665. Interest on Bank Accounts

Trustees frequently have in certain funds balances of cash too small for ordinary investment but not likely to be needed for some time. As it is considered necessary for this cash to produce income, the general practice is to deposit it in a savings bank. Such a deposit should not be treated as an investment but should continue to be carried as cash.

The interest credited on such savings accounts should be recorded on the books, like other income, by the entry:

Cash	$.....	
Income		$.....

If such income is on funds belonging to different trusts it will have to be prorated between the trusts. Interest received on the average daily balance in a checking account common to all the trusts will have to be prorated on the basis of the average daily balance in each.

§ 666. Trust Fund Passing by Will

The principal of the Janet Dawson Reeves trust is to be paid over to her legatees as directed by her will, under the

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provisions of the will of the founder of the trust which we are considering. (See § 652.) If at the time of her death this trust fund consists of $110,230 in investments and $186 in cash, it will be necessary for the trustee of the estate of James C. Dawson to deliver to the executor of the estate of Janet Dawson Reeves the amount of cash and other assets comprising this trust fund and to make the following entry (No. 14):

Principal	$.....	
Cash		$.....
Investments		.....

The will of James C. Dawson provided that upon the death of Mary Allen Dawson the principal of the trust fund bearing her name was to be divided among her children by the donor's brother. When the assets composing this fund are turned over to these children, the entry will be, as in the case of the Janet Dawson Reeves trust above:

Principal	$.....	
Cash		$.....
Investments		.....

§ 667. Reversion of Trust Fund to Estate

It is provided in the will that the Butler University trust at the end of twenty years shall revert to the undivided estate. Suppose that, due to sales and reinvestment, this fund at the end of that time amounts to $47,326. This is an increase of $7,326 over the amount of the original trust. To record the reversion the trustee should make Entries Nos. 15 and 16

Principal	$.....	
Investments		$.....

and

Investments	$.....	
Principal		$.....

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As will be seen from the postings on the trust ledger, the purpose of the first of these entries is to close out the Butler University Trust account and that of the second is to record the securities in the account of the undivided estate.

If any cash is included in the fund the entries will be (compare Entry No. 14)

Principal	$.....	
Cash		$.....
Investments		.....

and

Cash	$.....	
Investments	.....	
Principal		$.....

§ 668. Reasons for Amortization of Bond Premium and Discount

Bonds are seldom bought at their face value. The market value is a fluctuating quantity differing from the face value because of general financial conditions, the popular opinion of the value of the security, the rate of interest provided for, etc. A bond is very likely to be bought for a larger sum than the amount which upon its maturity it will return to the purchaser. If, for example, a $1,000 bond is bought for $1,043.80, the yield to the purchaser will be the interest on $1,000 at the specified rate during the life of the bond and at maturity the $1,000 of principal. The $43.80 is a premium paid for the privilege of receiving this interest during the life of the bond.

If a trustee, desiring to secure investments which would yield a profitable income, were to purchase a large number of bonds at a premium, the interest all being paid to the tenant, and the remainderman not only receiving no income, but also losing the amount of the premium paid on the bonds, the principal of the trust would in time become seriously depleted. Since secure investments yielding a good rate of interest

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usually sell at a premium, in order to allow trustees to purchase such bonds with equal justice toward both the tenant and the remainderman, the courts allow the premium paid on bonds to be "amortized" over the life of the bond.

As has been shown, the premium is an amount paid for the privilege of receiving the interest on the principal during the life of the bond. This premium is therefore a just charge against income, but the courts do not allow it to be deducted from the income of the year in which paid, as it would very frequently amount to more than that year's income from the particular bond on account of which it was incurred and would consequently deprive the tenant of all his income for the one year. "Amortization" means the gradual extinguishment of the premium paid by the trustees on bonds bought out of the principal funds, so that during the years preceding the maturity of the bond the income to the life tenant will have been reduced sufficiently to wipe out the premium during the life of the bonds.

§ 669. Law of Amortization

The statutes of the different states vary in regard to the propriety of amortization, and are not always consistent in applying the same principles to bond premium and discount.

> In New York the practice of amortization is upheld by the courts as an equitable and proper way of handling trust funds. In the State, however, the principle only holds good with reference to securities purchased by the trustee at a premium and not with reference to securities, owned by the testator which the trustee has taken over, appraised at a premium. In other words the whole interest received from securities turned over from the estate of the testator should be treated as income and the life tenant should not be charged with any part of the premium at which such securities may have been inventoried.
>
> Of course the terms of the will and the surrounding circumstances might show a different intention on the part

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of the testator. For uniformity of practice the court has decided that this intent to have the life tenant receive the full income from securities purchased at a premium, without reduction by amortization, must be expressed in the very clearest manner.[8]

§ 670. Methods of Calculating Amortization

There are several methods of handling amortization, of which the two most common are the straight-line method and the annuity method.

By the straight-line method the premium is simply divided by the number of interest payments which will be made on the bond and the income from the bond reduced at the time of each payment by this part of the premium. The following table will show how the premium of $43.80 paid on the purchase of a 6 per cent bond having a face value of $1,000, with 5 years to run, interest payable semiannually, will be amortized by the straight-line method.

Date	Interest Received	Income to Tenant	Amortization of Principal	Book Value
July 1, 1920				$1,043.80
Jan. 1, 1921	$ 30.00	$ 25.62	$ 4.38	1,039.42
July 1, 1921	30.00	25.62	4.38	1,035.04
Jan. 1, 1922	30.00	25.62	4.38	1,030.66
July 1, 1922	30.00	25.62	4.38	1,026.28
Jan. 1, 1923	30.00	25.62	4.38	1,021.90
July 1, 1923	30.00	25.62	4.38	1,017.52
Jan. 1, 1924	30.00	25.62	4.38	1,013.14
July 1, 1924	30.00	25.62	4.38	1,008.76
Jan. 1, 1925	30.00	25.62	4.38	1,004.38
July 1, 1925	30.00	25.62	4.38	1,000.00
Total	$300.00	$256.20	$43.80	

§ 671. The Annuity Method

Under the annuity method it is necessary to use a table of bond values. In the case of the bond above referred to, such a table would show that a 6 per cent $1,000 bond, interest payable semiannually, bought for $1,043.80, with 5 years

[8] Baugh and Schmeisser, Theory and Practice of Estate Accounting.

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to run, will return to the investor 5 per cent annually on the amount of the investment. Since $1,043.80 is the amount invested, the income at 5 per cent per annum will be $26.08 at the time of the first semiannual interest payment. The amount actually received, however, will be one-half year's interest at 6 per cent on $1,000, or $30. The difference between this amount and the $26.08 of actual earning power of the investment will constitute the amount of this period's amortization to be placed to the credit of the principal of the trust. The book value of the bond will then be reduced by this $3.92 from $1,043.80 to $1,039.88 and the one-half of 5 per cent for the next 6 months calculated on the basis of an investment of $1,039.88.

> Thus, the life tenant receives more during the first years, but less during the later years of the life of any bond, and at the maturity of the same the amounts amortized should have been so calculated that the book value of the bond will be its face, or par value, and the premium will have been paid by the amortized amounts added to the corpus at the end of each six months' interest period.[4]

The following table will show how the premium on this bond is amortized over the life of the bond by the annuity method:

Date	Interest Received	Income to Tenant	Amortization of Principal	Book Value
July 1, 1920				$1,043.80
Jan. 1, 1921	$ 30.00	$ 26.08	$ 3.92	1,039.88
July 1, 1921	30.00	26.00	4.00	1,035.88
Jan. 1, 1922	30.00	25.89	4.11	1,031.77
July 1, 1922	30.00	25.79	4.21	1,027.56
Jan. 1, 1923	30.00	25.69	4.31	1,023.25
July 1, 1923	30.00	25.58	4.42	1,018.83
Jan. 1, 1924	30.00	25.47	4.53	1,014.30
July 1, 1924	30.00	25.34	4.66	1,009.64
Jan. 1, 1925	30.00	25.24	4.76	1,004.88
July 1, 1925	30.00	25.12	4.88	1,000.00
Total	$300.00	$256.20	$43.80	

[4] Baugh and Schmeisser, Theory and Practice of Estate Accounting.

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§ 672. Entries of Amortization

When premium on a bond is being amortized, the book entry of each receipt of bond interest will be:

Cash (the amount received)	$.....	
Income (the amount of income to be allowed)		$.....
Principal (the amount of amortization)		.....

The credit to Income will be the amount placed in the Income to Tenant column of a table worked out by either of the two above methods. The credit to Principal will be the amount placed in the Amortization of Principal column.

When bond discount is to be amortized, as when government bonds, yielding a low rate, are bought below par, the average return being raised on account of the low cost, the entry at the time interest is received is:

Cash (the amount received)	$.....	
Principal (the amount of amortization)	.....	
Income (the amount of income to be allowed)		$.....

Review Questions

1. Why should a trustee's accounts be simple?
2. What four accounts must a trustee keep? What is the relation between the accounts for the entire estate and the accounts for the individual trusts?
3. What are a trustee's opening entries?
4. Explain posting to the trust ledger. Should the explanation of each entry be copied?
5. What is the entry for investment of cash?
6. How are sales of assets entered to show loss or gain?
7. What are the entries for receipts and disbursements of income? What is the entry when income is turned into principal?
8. How are any advances treated which were made before the trustee entered on his position?

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9. When should savings accounts be opened?
10. What entries are made when a trust fund passes by will?
11. If a trust fund reverts to the estate, what entries are made?
12. What is the object of amortizing any premium paid on bonds? How is it effected?
13. How is the principle of amortization applied in New York? What is the rule in your own state?
14. Explain the straight-line method of handling amortization.
15. Explain the annuity method of computing amortization.
16. What entries are made to show the process of amortization? What entries are made to show the amortization of a discount?

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CHAPTER LXXIV

TRUSTEES' REPORTS

§ 673. General Form

The periodical reports made by trustees to the court are in two parts, the first of which has to do with the principal and the second with the income. These are preceded by a summary of the condition of the estate as a whole. The supporting schedules which make up the larger part of the report analyze this summary in its relation to the principal and income of each individual trust.

At either the beginning or the end of the report should appear the certificate of the trustee as to the correctness of the report. The practice in the various states differs as to the form of this certificate, and at least the first one submitted by the trustee should be prepared with the assistance of his attorney.

The form to be followed in the schedules is specifically provided for in a few states, but the statutes of all mention the things to be shown. It should always be remembered that the court will have the report audited, and that expense to the estate will be saved if the schedules are clear and if they reconcile properly among themselves and with the books. In the following sections there are presented the principles generally followed and specimen schedules that will be found suitable in most states.

§ 674. Valuations Used

All assets of the estate must be carried in the reports at their book values. These are, in the case of assets which were

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included in the original inventory of the estate, the valuations at which they were appraised for that inventory, and in the case of assets purchased since the preparation of that inventory, the cost to the estate.

For the information of the court, many states require that the report of the trustee give also the market value or "bid" price on the day as of which the report is prepared. This means the day on which the trustee has closed his books, the last day whose transactions are included in the report. As it will probably take the trustee some time to prepare his report, it will usually not be actually filed until later. Under no conditions, however, should the books be changed to agree with the market value at any time during the trusteeship. If the asset becomes absolutely worthless it may, if desired, be written off by the entry

Principal ..... $.....
    Investments ..... $.....

but if this is done the asset must continue to be carried in the reports and accounted for as of no value.

§ 675. Closing the Books

It is unnecessary for the trustee who uses the simple system outlined in the two previous chapters to close his books at the time of making a report. If he uses a more complicated system which analyzes the various sources of income with separate accounts for interest, dividends, etc., and the various kinds of expenses, with separate accounts for taxes, insurance, repairs, etc., it will be necessary for him to close these accounts into Income in the way in which the nominal accounts are ordinarily closed into Profit and Loss in double-entry commercial bookkeeping.

When the trusteeship is finally wound up, all the assets be-

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ing turned over to the remaindermen, the trustee should close all the accounts on his books so that there will be no balance left in any of them. With the system outlined in the preceding two chapters the final closing entry would be:

Principal	$.....	
Income	.....	
Cash		$.....
Investments		.....

§ 676. Index to the Report

The report of a trustee who is handling more than one trust contains a considerable number of schedules. For the convenience of everyone who has to do with the report, it is always wise to furnish an index in the form of a list of schedules. This index may be in substantially the following form:

ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

LIST OF SCHEDULES

Summaries

Schedule No. 1 Summary Statement of Trusts

Principal

Trust No. 1, for the Benefit of Butler University
Schedule No. 2 Principal of Trust, January 31, 1922
Schedule No. 3 Sales During Year
Schedule No. 4 Purchases During Year
Schedule No. 5 Reconciliations

Trust No. 2, for the Benefit of Janet Dawson Reeves
Schedule No. 6 Principal of Trust, January 31, 1922
Schedule No. 7 Sales During Year
Schedule No. 8 Purchases During Year
Schedule No. 9 Reconciliations

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Trust No. 3, for the Benefit of Mary Allen Dawson
Schedule No. 10 Principal of Trust, January 31, 1922
Schedule No. 11 Sales During Year
Schedule No. 12 Purchases During Year
Schedule No. 13 Reconciliations

Trust No. 4, to Guarantee an Annuity to Henry G. Dawson and to Maintain and Educate the Children of James C. Dawson
Schedule No. 14 Principal of Trust, January 31, 1922
Schedule No. 15 Sales During Year
Schedule No. 16 Purchases During Year
Schedule No. 17 Reconciliations

Income

Trust No. 1, for the Benefit of Butler University
Schedule No. 18 Receipts
Schedule No. 19 Disbursements

Trust No. 2, for the Benefit of Janet Dawson Reeves
Schedule No. 20 Receipts
Schedule No. 21 Disbursements

Trust No. 3, for the Benefit of Mary Allen Dawson
Schedule No. 22 Receipts
Schedule No. 23 Disbursements

Trust No. 4, to Guarantee an Annuity to Henry G. Dawson and to Maintain and Educate the Children of James C. Dawson
Schedule No. 24 Receipts
Schedule No. 25 Disbursements
Schedule No. 26 Investments of Income

§ 677. Summary Statements of Trusts

Schedule No. 1 is used to show the general condition of the entire estate in the hands of the trustee on the date as of which the report is filed. If any form is prescribed it should be used, otherwise it may be presented in the following form:

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ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 1

SUMMARY STATEMENT OF TRUSTS

Showing Condition on January 31, 1922

Principal

Trust No.	Beneficiary	Cash	Investments	Total
1	Butler University		$ 40,000.00	$ 40,000.00
2	Janet Dawson Reeves.....	$ 186.00	110,230.00	110,416.00
3	Mary Allen Dawson.....	6,567.00	94,366.00	100,933.00
4	Undivided Estate	1,924.00	335,846.00	337,770.00
	Totals	$8,677.00	$580,442.00	$589,119.00

Income

Trust No.	Beneficiary	Cash	Investments	Total
1	Butler University	.....	.....	.....
2	Janet Dawson Reeves.....	.....	.....	.....
3	Mary Allen Dawson.....	.....	.....	.....
4	Undivided Estate	$9,454.00	$ 5,346.00	$ 14,800.00
	Totals	$9,454.00	$ 5,346.00	$ 14,800.00

Reference to the preceding chapter and to the synoptic and trust ledger worked out therein will show where the figures appearing on this schedule were obtained. In total they constitute the trial balance of the synoptic at the close of business on January 31, 1922, except that in this schedule cash is divided between principal and income. In detail the various statements on the schedule represent the trial balances of the various accounts in the trust ledger on that date. These various amounts are analyzed in the supporting schedules which follow.

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§ 678. Schedules of Principal

The amount of the principal of a trust at any time is the figure obtained by the following arithmetical steps:

1. Given the principal at the start, which may be the amount when the trust was established or the amount at the date of last previous report rendered by the trustee.

2. Add any increase due to profit on sales of assets or subtract any loss.

3. Add any increase to the principal due to the reversion of excess income to the principal (see § 667), or to any other cause.

4. Subtract any reduction of principal due to distribution or other causes.

The amount of cash on hand at any date is the sum of the amount at the start, plus the amount received from sales, from reversions of income, and from other causes, less the amount disbursed for purchases, expenses, and in distribution.

The book value of the investments will in the same way be the amount at the start, less the book value of the sales, plus the cost of the purchases, plus or minus any changes in the amount of the principal due to additional donations or to distribution.

The schedules having to do with principal are so designed as to show the changes in cash, investments, and principal from each of the above causes, and to group the transactions under each of these heads in such a way that the mathematical accuracy of the figures in the summary statements may be seen and the propriety of the trustee's transactions examined into.

§ 679. Inventory Schedules

The next schedule suggested for each trust is what may be called an "inventory schedule." The general rules for the amount of description to be given in inventories furnished by fiduciaries (see § 282) should be followed.

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The headings which it is necessary to show are Cash and Investments. Under Cash should be detailed the various depositories with the amounts in the possession of each and the pass-book number or any other identifying information.

The general heading, Investments, should be split up into the necessary subclassifications. Those which are most common are Real Estate, Mortgages, Notes Receivable, Stocks (or "Shares" as they are called in some jurisdictions) and Bonds. Others are accounts receivable, unsecured notes receivable, jewelry, etc. In brief, each asset should be so described as to distinguish it absolutely.

Such a schedule may be in the following form:

ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 2

Principal of Trust No. 1
For the Benefit of Butler University
January 31, 1922

Cash		None
Investments:		
Real Estate	None	
Mortgages:		
James Curtis and Anne Curtis, his wife, 5% first mortgage on Lots 17, 18, and 19, Swain's Addition to Town of Worthington, Greene County, Indiana, with improvements consisting of two-story brick dwelling and brick garage, assessed at $9,300	$ 5,000.00	
Stocks:		
100 shares Appleton Mining Co. 7% preferred stock, represented by Certificate No. 212, par value $10,000, present market value $10,450	$10,300.00	

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100 shares Lewiston Realty Co. 7% preferred stock, represented by Certificate No. 21 for 10 shares and No. 22 for 90 shares, par value $10,000, present market value $9,900.	9,700.00		
Total		20,000.00	
Bonds:			
American Belting Co., 1950, regular 5%, Nos. 511 to 525 inclusive, par value $15,000, present market value $14,850..	15,000.00		
Total Investments			$40,000.00
Total Principal			$40,000.00

§ 680. Schedules of Sales

The schedule following in the group having to do with the principal of the trusts is that listing the sales of assets from each trust by the trustee during the year. All information having to do with the sales should be shown, including the date of the court order authorizing the sale, a list of the items sold, the gross proceeds of each sale, the expense of the sale, and the difference between these two amounts or the net proceeds. The value at which the asset now sold has been carried on the books should also be given, and the schedule should be summarized by showing the difference between the net proceeds of the sale and the book value of the assets sold. This difference will be the net increase or decrease in the principal on account of sales during the year.

The schedule listing the sales may be in substantially the form given on page 686.

If there have been no sales during the year the schedules should be headed up in the manner suggested above, but in-

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ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 11

PRINCIPAL

Sales of Assets of Trust No. 3,
For the Benefit of Mary Allen Dawson,
During Year ended January 31, 1922

Date of Authorizing Order	Sale of	Selling Price	Commission	Net Proceeds	Book Value
Feb. 10, 1921	40 shares Stevenson Manufacturing preferred stock	$ 4,600.00	$ 5.00	$ 4,595.00	$ 3,400.00
"	Bond of American Tinplate Company	920.00	1.00	919.00	950.00
	Various items not detailed here	17,211.00	52.00	17,159.00	17,390.00
	Totals	$22,731.00	$58.00	$22,673.00	$21,740.00

Summary

Net Proceeds	$22,673.00
Book Value	21,740.00
Net Increase in Principal	$ 933.00

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stead of any list the words "No sales during the year" should be inserted.

§ 681. Schedules of Purchases

The schedules of purchases of assets for the principal of each trust require usually only the date of the authorizing order, the list of items purchased, their cost, and the expense of purchase, the sum of which makes up the gross amount paid. This schedule may be in the following form:

ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 8

PRINCIPAL

Purchase of Assets for Trust No. 2,
For the Benefit of Janet Dawson Reeves
During Year ended January 31, 1922

Date of Authorizing Order	Purchase of	Cost	Expense of Purchase	Gross Amount Paid
Feb. 12, 1921	$10,000 of 5½% bonds of city of Montrose, Colorado	$10,200.00	$ 10.00	$10,210.00
	Various items not detailed here	60,300.00	90.00	60,390.00
	Totals	$70,500.00	$100.00	$70,600.00

If no purchases have been made during the year the schedules should be shown but the words "No purchases during the year" will take the place of the usual list.

§ 682. Reconciliations of Principal

The changes in the Cash, Investments, and Principal accounts (see § 678) during the year are shown in summary in the last of the schedules of principal. To the cash which the

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trustee took over from the executor (or, after the first periodical report of the trustee has been filed, to the cash on hand at the date of the last previous report) is added the amount of the net proceeds of sales. From this sum there is subtracted the gross amount paid for purchases. Changes in the Cash account arising from any other purchases are then added or subtracted.

The changes in the Investments account are shown by subtracting the book value of the assets sold from the book value at the beginning of the period, and adding the gross amount paid for assets purchased. Any other changes must be separately shown below.

The principal at the close of the period is ordinarily the amount of the principal at the beginning of the period, amended by any change caused by profit or loss on sales of assets. Should any other items affect the principal they must be shown below.

The following is a satisfactory form for such a schedule as this:

ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 17

PRINCIPAL

Reconciliations, Trust No. 4,
To Guarantee an Annuity to Henry G. Dawson and to
Maintain and Educate the Children of
James C. Dawson

		Cash	Investments	Principal
Feb. 12, 1921	On hand as per trustee's inventory	$ 5,148.00	$334,652.00	$339,800.00
	Sales (Schedule 15): Net Proceeds .	31,200.00	.....	.....

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	Book Value ..	.....	33,460.00	.....
	Decrease in Principal ...	.....	.....	2,260.00
		$36,348.00	$301,192.00	$337,540.00
	Purchases (Schedule 16).	34,654.00	34,654.00	.....
		$ 1,694.00	$335,846.00	$337,540.00
	Excess income from Mary Allen Dawson Trust transferred to principal of Undivided Estate (Schedule 25).	230.00	.....	230.00
Jan. 31, 1922	On hand (Schedule 1)	$ 1,924.00	$335,846.00	$337,770.00

The opening figures in each column must be those which appeared on the summary schedule of the last previous report rendered by the trustee. The figures of sales must be taken from the schedules of sales and those of purchases from the schedules of purchases. Any other transactions which must be recorded in order to bring the balances in the various accounts to the figures shown on the summary schedule in the present report are then shown. It is in this way that the mathematical accuracy of the report is demonstrated. It is evident that the sum of the final totals of cash and investments must equal the total of principal in the reconciliation statement of each trust and in the summary schedule (No. 1) for all trusts.

§ 683. Schedules of Income

The schedules of income are ordinarily two for each trust. The first of these has to do with the receipts, and the second

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with disbursements. The facts which should be shown are sufficiently indicated by the schedules which follow:

ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 21

INCOME

Receipts, Trust No. 2,
For the Benefit of Janet Dawson Reeves,
During Year ended January 31, 1922

Date	Nature	Produced by	Amount
Feb. 12, 1921	Balance	Trustee's inventory	None
Mar. 1, 1921	Rent	Apartment house on Lots 7-12, etc.	$ 350.00
		Various items not detailed here.....	8,300.00
		Total	$8,650.00

ESTATE OF JAMES C. DAWSON
FIRST ANNUAL REPORT OF CHARLES FRAZIER, TRUSTEE
FILED AS OF JANUARY 31, 1922

Schedule No. 25

INCOME

Disbursements, Trust No. 3,
For the Benefit of Mary Allen Dawson,
During Year ended January 31, 1922

Date	Paid to	For	Amount
May 1, 1921	Collector of Taxes..	State, county, city taxes	$ 429.62
May 2, 1921	Life Tenant.....	Income from this trust	1,000.00
July 1, 1921	"	"	1,000.00
Sept. 1, 1921	"	"	1,000.00
Nov. 1, 1921	Collector of Taxes..	State, county, city taxes	429.62
Nov. 1, 1921	Life Tenant.....	Income from this trust	1,000.00
Jan. 1, 1922	"	"	1,000.00
Jan. 31, 1922	Salaries and office rent and expense.....		140.76

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Jan. 31, 1922	Transfer of excess income to Undivided Estate (Schedule No. 24)	230.00
Jan. 31, 1922	Balance (Schedule No. 1)	None
	Total	$6,230.00

The opening balance of income cash should be shown as the first item on the schedule of receipts. (See Schedule No. 21.) The closing balance of income cash, with the location of the deposit and the number of the pass-book, should be shown as the last item in the schedule of disbursements. (See Schedule No. 25.) It is essential that in the case of each trust the total of the schedule of receipts equal the total of the schedule of the disbursements.

If there have been any sales or purchases of assets for the account of income, as in the case of Entry No. 11 on the synoptic of the suppositional trust which we are considering, additional schedules of such purchases and sales and of the inventory of such assets now held must be added for the trusts affected. These schedules will be in the same form as the similar schedules of principal.

Review Questions

1. What form of trustee's report is used in your state?
2. At what value are trust assets carried on the books?
3. Is it necessary to close the books to make a report? When the books are finally closed, what will be the entries?
4. Why should there be an index to the trustee's report?
5. What should be shown on the first schedule? When are the figures obtained for this schedule?
6. What arithmetical steps are needed to ascertain the amount of the principal of a trust at any time? What is the purpose of the schedules that deal with the principal?
7. What is the object of the inventory schedules? What are the headings? What should go under each?

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8. What goes in the schedules of sales?
9. What goes in the schedules of purchases?
10. How are the changes in cash during the year shown? In Investments account? In the principal? What is the object of these reconciliation statements?
11. What do the schedules of income show? Why must they balance?

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CHAPTER LXXV

ACCOUNTING BY TRUST COMPANIES

§ 684. Separate Books for Each Estate Impossible

It must be admitted that the ideal accounting system for fiduciaries is to have an individual set of books for each separate estate represented. In the case of trust companies acting as fiduciaries, however, this is impracticable because of the great amount of labor which would be required if a separate set of books were kept for each of the large number of estates for which the average bank or trust company acts. When an individual is acting in a fiduciary capacity it is strongly recommended that a complete set of books be kept, separate from all other business, but for banks and trust companies it is necessary to devise a system of accounting which will retain the most valuable advantages of the individual sets of books and yet eliminate all unnecessary details.

§ 685. Systems in Use by Trust Companies

The method of handling individual trustees' accounts outlined in the previous chapters is equally adaptable for trust companies. All transactions are handled through the synoptic, and are posted to the trust ledgers in the usual way. For the sake of uniformity the same forms are used by trust companies and trust departments of banks in all their fiduciary functions, including administratorship, executorship, and trusteeship.

Form 31 shows the rulings of synoptics in use by two such companies. It will be noticed that the first of these is what is known as a "double-page form." The upper section is the left-hand page, the lower is the right. The use of the synoptic

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has been explained fully. In examining Form 31 it must be remembered that each of these companies uses the same form of sheet for the trust ledger as for the synoptic.

There is presented in the following sections another type of system. The forms suggested and explained in connection therewith will be found adapted to the use of the trust departments of the vast majority of banks and trust companies.

§ 686. The Control Sheet

Form 32a is the control sheet. When the estate is taken over, all the assets should be entered in the column headed Inventory at the appraised value. If this is not available the market value as of the date of death of the decedent may be used temporarily, or if neither is available a nominal value of $1 may be accepted. The correct value should, of course, be obtained at the earliest possible moment and an adjusting entry made to carry the items at this value. The total of the entries which up to this point are all credits to corpus should be carried over to the column headed, Corpus—Credit Balance.

As additional assets of the estate are taken over the same kind of entries will be made in the same way. It will be noticed that the only entries to be made on this sheet after the inventory are those which affect the corpus of the estate either by way of an increase—the result of the sale of an asset at a profit over inventory price (or occasionally the discovery of an uninventoried asset)—or a decrease, the result of the sale of an asset at a loss, or the payment of a debt of the decedent, the payment of a corpus expense, or the payment of a bequest.

Such changes in the amount of the corpus are provided for as follows: All expenses of administration, the payment of all debts of the decedent and all payments to beneficiaries should be entered in the column headed, Distributions, Expenses, and Debts—Debit. Any loss incurred in a sale of an asset should be entered in the column headed, Decrease—Debit. In the

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same way the amount of profit realized in the sale of an asset above the appraised value should be entered in the column headed, Increase—Credit.

Each entry made in these columns is the result of a change in the amount of corpus, and its effect must be shown by inserting on the same line in the Corpus—Credit Balance column the new corpus. This will be the previous balance less the amount of the new entry if it is a debit or plus its amount if it is a credit.

It will be evident that, since the only entries that are made on this sheet are those which affect the corpus of the estate by increasing or decreasing it, the entry for the sale of an asset should, so far as this sheet is concerned, show only the amount of profit or loss and not the amount at which the asset was originally inventoried.

Form 32a is designed to be used in administratorships and executorships. When a bank or trust company is acting as a trustee, either of an estate or under a voluntary trust agreement, Form 32i may be used. Except for the additional information called for at the top of the latter form, it is to all intents the same as Form 32a, and all the entries suggested in this chapter for Form 32a are equally applicable for Form 32i if that is substituted.

§ 687. Bank Balances Schedule

On Form 32b are entered all bank accounts which the decedent had during his lifetime, including savings bank accounts. These items were, of course, entered on the control sheet as a part of the original inventory. The control sheet, however, will not show their reduction or complete collection, as it shows only changes in the amount of corpus. When these assets are collected, entries recording this fact will be made in the credit column of the bank balances schedule. The headings of the other columns are self-explanatory.

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§ 688. Stocks Schedule

Form 32c is used for all stocks which may form a part of the estate. It is divided into several different blocks to facilitate the keeping of separate accounts for each particular kind of stock. In this way no difficulty is experienced in tracing the different events in the history of the administration of the estate relating to any one particular security. Each block provides for the entry of full information about the stock recorded therein.

When the stock is taken into possession by the executor it will be recorded as a part of the inventory on the control sheet at the market price or appraised value as of the date of death. It will also be recorded on Form 32c in the column headed, Received—Debit.

When the stock is sold there will almost certainly be either a loss or a gain. The loss or gain affects the corpus of the estate and is therefore recorded on Form 32a, as heretofore explained. The inventory value, which will be the same as the figure appearing in the Received—Debit column, will at the time of sale be recorded in the column headed, Delivered—Credit. Thus the asset is removed from the books, having been exchanged for another asset, namely, cash. The balance column requires no explanation. Such information as the dividend rate, certificate numbers, conversion privilege, etc., should be obtained and entered on the form for reference when needed.

§ 689. Investments Schedule

Form 32d provides for the recording of assets consisting of bonds, notes, etc., except bonds and mortgages on real property. The form is similar to Form 32c and should be handled in the same way. Anyone at all familiar with transactions in securities will at once see the advantage of having the special information called for in these forms.

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§ 690. Accrued Receivables Schedule

Form 32e provides a place in which to record the class of assets found in almost every estate and generally known as "accrued receivables." This class includes all interest accrued to the date of death of the decedent not collected by him before death, whether past due or not yet due, dividends declared before the date of death but not actually paid or collected, and all similar assets which are a part of the corpus of the estate. The use of the columns is self-explanatory.

§ 691. Real Estate and Mortgages Schedule

A careful study of Form 32f is desirable, as it is one of the most important of the entire set. It is used for the recording of all bonds and mortgages on real property forming a part of the corpus of the estate, and also of all real property owned. A separate sheet should be used for each mortgage and for each piece of real property.

First we shall explain the use of the form to record a bond and mortgage. The bond and mortgage would in all cases be recorded as a part of the inventory of the estate on Form 32a as a credit. The debit will appear on Form 32f. The information required properly to fill out the form should be obtained at the earliest possible moment and entered in the places indicated. If a trust estate is being handled, mortgages on real property will form an important part of the investment.

A description of the property should be entered in brief so that the property can be quickly identified without a reference to the mortgage, which would probably be kept in the vaults and be therefore not readily accessible. If the property is located in a city, the section and block numbers are important. Frequent appraisals of the property under mortgage should be had and a record of such appraisals entered in the books. The tax bills should be examined by the trustee after every tax-paying period, and this fact should be entered. The

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interest columns are important as a record but not as a part of the accounting because interest is income and therefore not to be entered in the corpus forms. (See § 696.) The columns at the extreme right of this form are devised for the purpose of keeping a complete record of the insurance on the property mortgaged.

When it is desired to use the form for the purpose of recording real property, all that is necessary is to strike out the word "Mortgages" from the title. Most of the other information is helpful, but the spaces which apply only to mortgages (such as interest, mortgage date, principal due, extended to, etc.) are not used.

The reverse of the form is used for any additional information which may be desired, such as a list of papers received in connection with the property, etc.

§ 692. Miscellaneous Schedule

Form 32g is for the purpose of recording any other assets of an estate which may come into the hands of the executor, such as jewelry, works of art, household furniture, clothing, and the like.

§ 693. Cash Schedule

The cash sheet, Form 32h, is most important because on it are recorded all transactions involving corpus cash. It is set up in such a way that the person preparing the account of proceedings may the more readily pick out the items to be placed in particular schedules.

When the executor first enters upon his duties he will find little or no cash. Usually a decedent does not have more than a few dollars in actual cash. The general practice of trust companies is to consider money in a decedent's deposit account in a bank as not being cash until it has been taken possession of. Following this theory the trust company acting as execu-

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tor, when it receives the bank book or other evidence showing that the decedent maintained a bank account with a certain bank and that the balance in that bank on the date of death was a given sum, enters the amount on Form 32a as a credit to the estate in the inventory column, thus making itself accountable for the amount. The debit is entered on Form 32b. When the trust company has filed its certificate of appointment as executor and thus shown its right to handle the funds, the bank account should be entered on Form 32h in the second column as a debit, Realization of Assets, Personalty.

If the executor sells a piece of real property, as he may do where such a power is conferred upon him by the will, he will enter the proceeds of the sale in the first column on this form as a debit, Realization of Assets, Realty. In the case of a realization of cash from the sale of a piece of real property the credit would be on Form 32f.

From time to time, as the various assets which the executor took into possession are sold and thus converted into cash, entries will be made in one of the two columns mentioned, namely, (1) Realization of Assets, Realty, (2) Realization of Assets, Personalty. The third debit column is provided for cash found in the possession of the decedent or in his safety deposit box after he dies. This would include gold coins and the like.

On the credit side we have three columns whose headings will readily explain their uses. The entries in each of these columns, it will be seen, affect the corpus of the estate and therefore will be entered on Form 32a in the first column, which is a debit column. Thus we have the debit and credit entries.

Particular attention should be called to the fact that this schedule has to do with *corpus* cash only. Income transactions are handled through Form 32j. (See § 696, "Accounting for Income.")

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§ 694. Summary of Entries

That the above is a complete double-entry system will be shown by the following analysis showing the two sides to the entry of every transaction:

Bank Accounts of Decedent (§687).

1. When executor takes possession:

Bank Balances (on Form 32b)	$.....	
Inventory (on Form 32a)		$.....

2. As executor realizes these balances:

Cash (on Form 32h).....	$.....	
Bank Balances (on Form 32b).....		$.....

Stocks (§688).

1. When executor takes possession:

Stocks (on Form 32c).....	$.....	
Inventory (on Form 32a).....		$.....

2. When stocks are sold at a loss:

Cash (on Form 32h).....	$.....	
Decrease (on Form 32a).....	.....	
Stocks (on Form 32c).....		$.....

3. When stocks are sold at a profit:

Cash (on Form 32h).....	$.....	
Increase (on Form 32a).....		$.....
Stocks (on Form 32c).....		.....

Investments (§689).

1. When executor takes possession:

Investments (on Form 32d).....	$.....	
Inventory (on Form 32a).....		$.....

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2. When investments are sold at a loss:

Cash (on Form 32h)	$.....	
Decrease (on Form 32a)	.....	
Investments (on Form 32d)		$.....

3. When investments are sold at a profit:

Cash (on Form 32h)	$.....	
Increase (on Form 32a)		$.....
Investments (on Form 32d)		.....

Accrued Receivables (§690).

1. When executor takes possession:

Accrued Receivables (on Form 32e)	$.....	
Inventory (on Form 32a)		$.....

2. When executor collects:

Cash (on Form 32h)	$.....	
Accrued Receivables (on Form 32e)		$.....

Real Estate and Mortgages (§691).

1. When executor takes possession:

Real Estate and Mortgages (on Form 32f)	$.....	
Inventory (on Form 32a)		$.....

2. When mortgages are collected:

Cash (on Form 32h)	$.....	
Real Estate and Mortgages (on Form 32f)		$.....

3. When real estate is sold at a loss:

Cash (on Form 32h)	$.....	
Decrease (on Form 32a)	.....	
Real Estate and Mortgages (on Form 32f)[1]		$.....

[1] No column is needed on the form for the credit entry of payment of the mortgage or sale of the property, which is noted by indorsement on the face of the form.

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4. When real estate is sold at a profit:

Cash (on Form 32h)	$.....	
Increase (on Form 32a)		$.....
Real Estate and Mortgages (on Form 32f)[2]		.....

Miscellaneous Assets (§692).

1. When executor takes possession:

Miscellaneous Assets (on Form 32g)	$.....	
Inventory (on Form 32a)		$.....

2. When sold at a loss:

Cash (on Form 32h)	$.....	
Decrease (on Form 32a)	.....	
Miscellaneous Assets (on Form 32g)		$.....

3. When sold at a profit:

Cash (on Form 32h)	$.....	
Increase (on Form 32a)		$.....
Miscellaneous Assets (on Form 32g)		.....

4. When distributed:

Distributions, Expenses, and Debts (on Form 32a)	$.....	
Miscellaneous Assets (on Form 32g)[3]		$.....

It is believed that from these common entries it will be plain how to handle other transactions which may arise.

§ 695. Making Up the Final Acccount

When the time has arrived for the executor to make up his final account of proceedings, he will find that by taking from Form 32a the inventory, and by charging himself with that,

[2] No column is needed on the form for the credit entry of payment of the mortgage or sale of the property, which is noted by indorsement on the face of the form.

[3] The distribution of any other assets is handled in the same manner, the proper asset account being credited.

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he has the first schedule of his account complete; or if the estate is large enough to make it worth while to subdivide the inventory into the different kinds of property he may make a separate schedule of each of the asset schedules, to-wit: Forms 32b, Bank Balances; 32c, Stocks; 32d, Bonds; 32e, Accrued Receivables; 32f, Real Estate and Mortgages; and 32g, Miscellaneous. Many trust companies, like individual fiduciaries (see § 650), combine all the assets into two accounts, Cash and Investments.

The corpus credit schedules may be made up directly from the three credit columns of Form 32h, Administration Expense, Debts, and Legacies. In this way the entire accounting is made without trouble, without danger about proving at the end of the work, and without having to make an analysis of the events which took place at the beginning of the administration period, now passed from the memory of the executor. The corpus balance on hand as shown by the account of proceedings will be the same as the balance of the estate as shown on Form 32a. It therefore follows that if the bookkeeping during the administration period has been correct (and if a bank or trust company is the executor or administrator it almost certainly will be), the account is bound to be correct. With these forms used as outlined herein, any bookkeeper can make up the account without difficulty. The one thing which must receive careful attention in all fiduciary accounting is the analysis of the entries at the time they are originally made.

§ 696. Accounting for Income

Income and expenses against income are handled through Form 32j, at the top of which provision is made for showing the capacity in which the institution is acting, the names and addresses of beneficiaries, and the distributive shares and rates of income each is to receive. There is also provided a space for the method of remitting, such as by check once a

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month, by cable, or otherwise. On the upper right-hand side is provided a place for the name of the trust or account, the amount of commission, the rate of commission, and when deductible.

The debits are payments either to beneficiaries or for expenses against and losses of income. Those debits which appear in the column headed Deductions are such as may be deducted from the income of the estate for federal income tax purposes, the law of which was kept in mind in the designing of the form.

The credit side of the sheet is separated into the various kinds of income. The analysis is likewise based on the federal income tax requirements, and is so planned as to facilitate the making up of the federal income tax returns. The form could, of course, have been drawn up so as to give a more detailed analysis, but such an increase in the number of columns required could very easily make the accounting system impracticable and unwieldy. It will be found that this form will take care of the great majority of cases very nicely.

In the preparation of the immediate and final accountings for income the executor charges himself with the credits from this sheet, and gives himself credit for the debits, as with any other system. (See § 636.)

§ 697. Other Records Kept

Form 32k, known as the "Personal Trust Department Record," is used for recording the facts about the estate and for noting the events that are to take place during the course of administration. In order to call attention at the proper time to those various items the doing of which is extremely important to the proper performance of the duties of an executor, a complete card index or tickler is a necessary part of the equipment of a trust department. The cards should be filed by dates so as to bring these matters before the person in

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charge of the work in ample time, so that they may be taken care of in due course.

Review Questions

1. What is the advantage of having a separate set of books for each estate? Why is it not feasible for trust companies and banks? What is done to meet this situation?
2. What is the control sheet? What entries are made on the sheet? What is the first entry?
3. What is the purpose of the bank balance schedule? What goes into the credit column? What is the debit column and what goes into it?
4. What is the purpose of the stocks schedule? How is it arranged to accomplish this end? How are the entries made?
5. What is the purpose of the investments schedule? How are the entries made?
6. What is the object of the accrued receivables schedule? What is included in this class of assets?
7. What assets are recorded on the real estate and mortgage schedule? How will a bond and mortgage be entered? What details should appear on the record? How is the schedule used for real estate?
8. What is the miscellaneous schedule used for?
9. What assets are considered cash? What are the successive entries made to show a bank balance? If real estate were sold for cash, what would the entries be? What are the three debit columns for? What are the three credit columns for?
10. In making up the final account, what would be charged to the executor? Into what two accounts could this charge be divided? Into what six accounts? Which are the three credit schedules? What are the advantages of the procedure outlined? What is necessary to ensure correctness?
11. What is shown in the Cash Income account? What are the debit entries? What are the credit entries? How is the accounting for income prepared?
12. What is the purpose of the personal trust department record? What is a tickler and how is it used?

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PART VII
FORMS

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FORMS

Form 1. Last Will and Testament

I, Henry H. Beckwith of the City of New York, do hereby make, publish and declare this my last will and testament, hereby revoking all former wills by me made.

1. I give, devise and bequeath to my wife, Esther R. Beckwith, during her life, the use of my house, known as 91 West Seventy-second Street, in the City of New York, and the use of my garage in said city, all taxes and water rates and the cost of all necessary repairs on the said real estate to be paid by my said wife while she has the use of the same.

2. I give and bequeath to my said wife all my linen, bric-a-brac, works of art, household goods and furniture (useful and ornamental), china, plate, silverware, books, and pictures, and the motor cars and appurtenances thereto belonging that I may own at the time of my death.

3. I give and bequeath to my trustees, hereinafter mentioned, such sum, not less than two hundred thousand dollars ($200,000) nor more than three hundred thousand dollars ($300,000) as, in the opinion of my said trustees, shall be amply sufficient to produce an annual income of twelve thousand ($12,000) in trust, however, for the uses and purposes following:

(a) To apply, during the life of my said wife, the income thereof, to the extent of twelve thousand dollars ($12,000) per year, in equal quarterly payments to her use, and during the same period, to apply the income, if any, in excess of that sum to the use of my lineal descendants, in equal shares, *per stirpes*, and not *per capita*.

(b) Upon the death of my said wife, to dispose of the principal of the said trust fund as part of my residuary estate, in the manner directed by the tenth article of this will.

I declare that the provisions of this will for the benefit of my said wife are to be in lieu and bar of her dower and of all other right, share, or interest of, in, or to my estate.

4. I give and devise to my son, Henry H. Beckwith, Jr., that certain parcel of land on which is my summer home at Bristol, Massachusetts, known as Birch Lodge, together with all other buildings thereon and the contents thereof and the appurtenances thereto, and all my land in the town of Bristol aforesaid, to have and to hold the same to him, his heirs and assigns forever.

5. I give and bequeath to my said son all my jewelry, wearing apparel, personal ornaments and effects.

6. I give and bequeath to my trustees, hereinafter named, the following sums in trust, for the uses and purposes following:

(a) One hundred thousand dollars ($100,000) to apply the income thereof to the use of my brother, Rufus A. Beckwith, during his life.

(b) Fifty thousand dollars ($50,000) to apply the income thereof to the use of Maud Beckwith, wife of my said brother, Rufus A. Beckwith, during her life.

(c) Twenty thousand dollars ($20,000) to apply the income thereof to the use of my cousin, June Stimson, the widow of John Stimson, during her life.

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7. Upon the death of each of the beneficiaries named in the sixth article, to dispose of the principal sum held for such beneficiary as part of my residuary estate, in the manner directed by the tenth article of this my will.

8. I give and bequeath to the corporations hereinafter named the sums designated:

To the Syrian Protestant College at Beirut, Syria, I give $10,000.

To Stevens Institute, Hoboken, New Jersey, I give $10,000.

To the Home for Incurables in the City of New York, I give $10,000.

To Hampton Institute, Virginia, I give $10,000.

9. I exonerate and discharge all legatees under this will from the payment of any indebtedness there may be owing to me by them at the time of my death.

10. All the rest, residue, and remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise and bequeath to my trustees, hereinafter named, in trust, however, for the uses and purposes following:

(a) To divide the said property into as many equal shares as I shall leave children me surviving, and lineal descendants of deceased children, one share for each child, and one share for the lineal descendants of each deceased child, the names of all my children now living being Anne Beckwith Bays, Helen Beckwith Gardner, Mary Beckwith Cox, and Henry Beckwith, Jr.

(b) To convey, transfer and pay over to the lineal descendants of any child of mine, who shall not be living at the time of my death, the share set apart for such lineal descendants in equal shares, *per stirpes* and not *per capita*.

(c) To apply the income of each share, set apart for the benefit of any child of mine, to the use of such child until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child, one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life, and upon the death of the said child, to convey, transfer and pay over the principal thereof in such manner to such person or persons as the said child shall direct by his last will and testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

11. I give to each of my cousins, Charles A. Barnes and Morton F. Barnes of Poughkeepsie, N. Y., an annuity of three thousand dollars ($3,000), to be paid semiannually to each during their respective lives, and I direct my executors and trustees to set apart, invest and hold in trust in separate funds, one for each annuitant, sufficient funds to produce by the clear net interest and income thereof the amount of annuities herein provided and to pay the same as herein provided. Upon the termination of each annuity the principal of the fund producing such annuity shall be paid to the Tuskegee Institute at Tuskegee, Alabama.

12. I direct my trustees to apply the income of all securities at any time held by them to the use of the beneficiary for whom they are held, irrespective of the price paid for them or of their market value at any time, it being my intention that no part of such income shall be applied as a sinking fund to offset the gradual loss of the premium or market value of any such securities.

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13. I hereby give my executors and trustees acting under this will, full power and authority, in their discretion, to hold and retain any property coming to them under this will in the same form of investment as that in which it may exist at the time of my death, although it may not be of the character of investments now permitted by law to trustees. I also give to my said executors and trustees full power and authority in their discretion, to sell, lease, or exchange the whole or any part of such property, whether real or personal, and to invest and reinvest the proceeds in such amounts as they may see fit, in real estate in the State of New York or elsewhere, or in bonds of any state or government, within or without the United States, or in bonds, notes, or other obligations secured by mortgage on real estate within or without the State of New York, or in the stocks or bonds of such railroad or other companies in any part of the United States or Canada as, at the time of such investment, are in good credit and standing; or, with the written consent of the beneficiary, in corporate or other stocks or securities or other personal property of any kind or description, although the same may not be of the character permitted for trustees' investments by the ordinary rules of law.

14. I hereby authorize my executors and trustees to compromise and adjust any claim of whatever kind, which may be made against or in favor of my estate, upon such terms and in such manner as may to them, in their absolute and uncontrolled discretion, seem advisable.

15. If any bequests or directions of this will be ineffectual or invalid under the law of New York, I hereby give and bequeath to my wife, should she survive me, absolutely and without condition all my property and estate of whatever nature and wherever situated which for any reason may not be sufficiently disposed of by this will.

16. I appoint my son, Henry H. Beckwith, Jr., James Sandford of New York City, Walter Baldwin of Bristol, Massachusetts, and the Farmers Loan and Trust Company of the City of New York the executors of and trustees under this will. It is my wish, however, that my said son shall not act as trustee for the share set apart for his own benefit. I direct that no security be required of any of my executors or trustees in any jurisdiction where they may be called upon to act in the settlement of my estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of May, 1920.

HENRY H. BECKWITH [SEAL]

The said will on four sheets, each signed by the testator, is signed, sealed, published and declared by Henry H. Beckwith, the testator, as and for his last will and testament, in the sight and presence of us, who in each other's sight and presence, and in the presence of the testator and at his request have hereunto subscribed our names as witnesses this 7th day of May, 1920.

MURRAY CANNES, 183 Mountain Ave., Montclair, N. J.
SILAS M. RUSSELL, 1145 Park Ave., New York City.
ELMER W. MARSH, 13 West 11th St., New York City.

The foregoing form has been compiled from some of the most important wills filed within the last years in the surro-

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gate's office in New York City. These wills disposed of millions and were prepared by the best legal talent in that city.

Form 2. Analysis of Preceding Will

1. To Esther R. Beckwith, wife, use during her life of house, 91 West Seventy-second Street, New York City, and of garage in said city, subject to taxes, water rates and necessary repairs.

2. To Esther R. Beckwith, wife, all linen, bric-a-brac, works of art, household goods and furniture (useful and ornamental), china, plate, silverware, books and pictures, and motor cars and appurtenances thereto belonging.

3. (a) To Esther R. Beckwith, wife, use during her life, to extent of $3,000 quarterly, of income from such sum between $200,000 and $300,000 as in opinion of trustees will be amply sufficient to produce annual income of $12,000.

3. (a) To lineal descendants, equally *per stirpes,* use of remainder of income from above trust.

4. To Henry H. Beckwith, Jr., son, parcel of land on which is summer home at Bristol, Massachusetts, all buildings, contents thereof and appurtenances thereto, and all land in town of Bristol.

5. To Henry H. Beckwith, Jr., son, all jewelry, wearing apparel, personal ornaments and effects.

6. (a) To Rufus A. Beckwith, brother, income during his life from trust of $100,000.

6. (b) To Maud Beckwith, sister-in-law, income during her life from trust of $50,000.

6. (c) To June Stimson, cousin, income during her life from trust of $20,000.

8. (a) To Syrian Protestant College, Beirut, Syria, $10,000.

8. (b) To Stevens Institute, Hoboken, New Jersey, $10,000.

8. (c) To Home for Incurables, New York City, $10,000.

8. (d) To Hampton Institute, Virginia, $10,000.

9. To all legatees, release from payment of any indebtedness due deceased.

10. To Anne Beckwith Bays, Helen Beckwith Gardner, Mary Beckwith Cox, and Henry Beckwith, Jr., children, use of income from remainder until forty years of age; then one-half of principal of his or her share and use during life of income from other half, principal to be paid over as directed by will of each child or to child's heirs-at-law.

11. (a) To Charles A. Barnes, cousin, annuity of $3,000, to be paid semi-annually during life.

11. (b) To Morton F. Barnes, cousin, the same.

11. (c) To Tuskegee Institute, Tuskegee, Alabama, principals of two funds furnishing annuities to Charles A. Barnes and Morton F. Barnes, to be paid upon termination of each annuity.

15. To Esther R. Beckwith, wife, all property not otherwise disposed of. (Residuary legacy.)

SPECIAL STIPULATIONS

12. No amortization charged against life tenants.

13. Executors and trustees have power to continue any existing invest-

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ment although of character not now permitted by law to trustees. May invest in real estate anywhere, or in bonds of any state or government (foreign included), or in bonds, notes or other paper secured by real estate mortgage anywhere, or in any stocks or bonds of companies in United States or Canada in good credit and standing, or (with written consent of beneficiary) in any property whatever.

14. Executors and trustees may compromise and adjust any claim in any way.

16. No security required from any executor or trustee in any jurisdiction.

Form 3. Will of Grover Cleveland

I, Grover Cleveland, of the Borough of Princeton, in the State of New Jersey, do make, publish, and declare this my last will and testament, hereby expressly revoking all previous wills by me made:

First—I hereby direct that after the payment of all my debts and funeral expenses an appropriate monument, with brief inscription and only moderately expensive, be erected at my grave and paid for out of my estate. I desire to be buried wherever I may reside at the time of my death, and that my body shall always remain where it shall be at first buried subject to its removal only if it shall be absolutely necessary in order that it shall repose by the side of my wife and in accordance with her desire.

Second—I give to my niece, Mary Hastings, daughter of my sister, Anna Hastings, the sum of $3,000, to be paid to her as soon as practicable after my death.

Third—I give to my friend, Richard Watson Gilder, the watch given to me in 1893 by the said Gilder and E. C. Benedict and J. J. Sinclair, and also the chain attached to the same when last worn by me.

Fourth—I give to each of the four daughters of my nephew, Richard Hastings, now or lately living with my sister, Anna Hastings, the sum of $2,000 each.

Fifth—I give to Frank S. Hastings, my good friend and executor of this will, as the most personal memento I can leave to him, the seal ring I have worn for many years, which was given to me by my dear wife, and with whose hearty concurrence this gift is made.

Sixth—I give to my two daughters, Esther and Marion, and to my two sons, Richard F. and Francis G., the sum of $10,000 each, to be paid to them, respectively, as they each shall arrive at the age of 21 years. Until these legacies are paid, or shall lapse, they shall be kept invested and the income derived therefrom shall be paid to my wife, and the aggregate of said income shall be applied by her to the support, maintenance, and education of said children in such manner and in such proportions as she shall deem best, without any liability to any of said children on account thereof. If, however, either of my said daughters shall before her legacy becomes payable cease for any reason to reside with her mother, then, and from that time, the income arising from the investment of her legacy shall be paid to said daughter. In case either of my said children shall die before his or her legacy shall be actually paid, leaving a child or children, then said legacy shall be paid to such child or children, but otherwise the said legacy shall lapse and become a part of the residuary estate disposed of by this instrument.

Seventh—All the rest and residue of my estate and property of which

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I may die seized or possessed, of every kind and nature, and wheresoever the same may be situated, I give, devise, and bequeath to my dear wife, Frances F. Cleveland, and to her heirs and assigns forever, and I hereby appoint her guardian of all my children during their minority.

Eighth—I hereby appoint my wife, Frances F. Cleveland, executrix and Frank S. Hastings executor of this my last will and testament.

Witness my hand and seal at Princeton, New Jersey, this twenty-first day of February, one thousand nine hundred and six.

GROVER CLEVELAND.

The foregoing instrument was on the day it bears date signed by Grover Cleveland, the testator therein named, in the presence of each of us, and we both being present at the same time. And the said testator did then and there acknowledge and declare, to us and each of us, that said instrument was his last will and testament, and thereupon we did in the presence of each other and of said testator, and at his request, subscribe our names hereto as attesting witnesses.

ANDREW F. WEST, Princeton, N. J.
JOHN H. FINLEY, New York City, N. Y.

This will is singularly attractive because of the kindly, human feeling that it expresses, and the obvious desire to cause least trouble to those he leaves behind him. It is a model will in all respects.

Form 4. The Will of Edward Harriman

I, Edward H. Harriman, of Arden, in the State of New York, do make, publish, and declare this as and for my last will and testament, that is to say:

I give, devise, and bequeath all my property, real and personal, of every kind and nature, to my wife, Mary W. Harriman, to be hers, absolutely and forever, and I do hereby nominate and appoint the said Mary W. Harriman to be executrix of this will.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this eighth day of June, in the year nineteen hundred and three.

EDWARD H. HARRIMAN [L. S.]

Signed, sealed, published, and declared by the testator as and for his last will and testament, in our presence, who, at his request, and in his presence, and in the presence of each other, have each of us hereunto subscribed our names as witnesses.

CHARLES A. PEABODY, 13 Park Avenue, New York.
C. C. TEGETHOFF, 291 East Seventeenth Street, Flatbush, L. I.

This can be used only in those cases where a man's wife is a capable business woman and understands and can carry

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out their joint plans. Russell Sage's widow did a magnificent work with his immense fortune. Mark Hopkins' widow, instead, in her old age married a decorative artist employed on the property, and the Hopkins estate has become the Searles estate and he has passed it on to his own legatees.

Form 5. Codicil to a Will

I, Harold Lasker, of *672* Madison Avenue in the Borough of Manhattan, City, County, and State of New York, do hereby publish and declare this codicil to my last will and testament (executed February 17, 1920) in manner and form following:

Whereas in paragraph four of my said last will and testament, I did give and devise certain real property, consisting of one store and residence, combined, situated in Long Island City, New York, to my nephew Henry Lasker, I do now (in consequence of his death) revoke said gift and do hereby give and devise the said real property, as in such will described, to my niece Alma Lee Edwards, of Dobbs Ferry, New York, to her and her heirs forever.

In Witness Whereof, I have hereunto set my hand and seal this third day of May, in the year ninteeen hundred and twenty-one.

Harold Lasker [L. S.]

Signed, sealed, published, and declared by the testator as and for his last will and testament, in our presence, who at his request, and in his presence, and in the presence of each other, have each of us hereunto subscribed our names as witnesses, on the date aforesaid.

Charles A. Price, 13 Park Avenue, New York.
C. C. Scott, 291 East Seventh Street, Brooklyn, New York.

Form 6. Rules of Probate in Maine

RULES OF PROBATE

Governing Practice and Procedure in the Courts of the State of Maine

Approved 1916

I

Any party may appear in the probate court, in person or by an attorney authorized to practice in the courts of this state, or by a person authorized by writing, filed in said court for that purpose. A person, other than an attorney, so appearing for another, or a person appearing for himself, shall file with the register a writing giving his name, residence, the matter in which, and the name of the person or persons for whom he appears. Such writing shall be placed on file, a corresponding entry shall be made on the docket and such person shall indorse his name

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on the back of the petition, or other paper in the matter in which he appears.

II

If a party shall change his attorney pending any proceeding, the name of the new attorney shall be substituted on the docket for that of the former attorney and said party shall give notice thereof to the adverse party: and until such notice or change, all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, except in cases in which by law a notice is required to be given to the party personally; provided, however, that nothing in these rules shall be construed to prevent any party interested from appearing for himself, in the matter provided by law, and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

III

When the authority of an attorney at law to appear for any party shall be demanded, if the authority shall declare that he has been duly authorized to appear by an application made directly to him by such party or by some person whom he believes to have been authorized to employ him, such declaration shall be deemed and taken to be evidence of authority to appear and prosecute or defend in any proceeding in said court.

IV

Petitions and other matters upon which notice has been ordered will not be acted upon until after the return hour, and any attorney or other duly authorized person who desires to appear to contest, or object to any matter in order for hearing, shall give notice to that effect on or before the opening hour of the session of the court at which such hearing is to be had.

V

Approved blanks will be furnished by the Register and must be used in all proceedings to which they are applicable.

VI

Notice will not be ordered on any petition, report, account or other instrument until the same has been actually filed in Court.

VII

The names of attorneys presenting petitions and other instruments in Court to be acted upon should be indorsed thereon to secure the prompt issuing of notices and for other purposes.

VIII

Petitions to sell real estate or personal property, or for allowances to widows or minor children will not be acted upon until the inventory in that estate has been duly filed in Court and approved.

IX

Petitions to sell real estate for the payment of debts, or legacies, except where the amount has been ascertained by the settlement of an

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account or the report of Commissioners of insolvency, must be accompanied with a list under oath, of the debts (and legacies, if any) due from the estate, and the amount of the expenses of administration up to the time of the application.

X

No letter of appointment of a non-resident administrator, executor, trustee, guardian or conservator shall be issued until such officer has filed with the Register a written appointment of a resident agent or attorney.

XI

All petitions for assessment of inheritance taxes shall be filed in duplicate.

XII

Notice will be ordered on all petitions for the appointment of an administrator de bonis non or de bonis non with the will annexed, unless the appointment of a person entitled by law to administer the estate is requested, or the petition is assented to, to the satisfaction of the Court.

XIII

Representations of Insolvency should be accompanied with a statement, under oath, of the amount so far as can be ascertained, of the debts due from the estate, and of the amount of the appraisal of the real and personal property.

XIV

The Court may appoint a guardian ad litem, or require the appointment of a guardian for minors in cases in which they are interested, before administration is granted, account is settled. allowance made for the widow or license granted to sell real or personal estate, or in any matter pending wherein they may be interested.

XV

Accounts presented for order of notice must be fully stated before they are presented and notice ordered thereon.

XVI

Charges and fees of the Register shall be paid in advance. The Court may refuse to hear any cause or matter, or allow any account until such charges and fees have been paid.

XVII

When a surety company is offered as surety on Probate Bonds, a statement of the charge therefor must be filed in Court with the bond and with each renewal thereof. And no such bond shall be approved unless the name of the person executing the bond for the surety company has been certified to the Register by the insurance commissioner, or unless and until such surety company shall have filed with the Register a power of attorney or a certified copy thereof authorizing the execution of such bond. The Court may require proof in the form of an affidavit or otherwise, that the person purporting to be an officer of any surety company and executing in behalf of the company any bond, letter or power of attorney, is in fact such an officer.

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XVIII

The signature of principals and sureties to all probate bonds should be written in full and witnessed.

XIX

Sureties on the bonds of administrators, executors, guardians, trustees or conservators, will not be appointed appraisers or commissioners on the same estate, nor will any person who is related to the administrator, executor, guardian, trustee, conservator or heirs at law within the sixth degree be appointed to either of said trusts. Christian names and residences of principals and sureties on bonds and of appraisers and commissioners should be fully stated.

XX

Any petition addressed to the Court may be amended in matter of form under the direction of the Court, with or without notice, when the rights of parties will not be affected.

XXI

All petitions for license to sell real estate shall contain an accurate description of the real estate to be sold, and the order of notice thereon shall contain a copy of such description and shall not be printed in the consolidated form.

XXII

All official communications relating to cases and business in court should be addressed to the Register of Probate to avoid delay.

XXIII

Parties not familiar with the proceedings in the Probate Court are expected to secure assistance of competent counsellors. Neither the Judge nor Register can advise in matters coming before the Court

XXIV

No person entitled by law to administer an estate shall be appointed within thirty days after the death of the decedent without consent of all other persons so entitled, other than creditors, who are resident in this State.

XXV

The Judges of Probate may order notices on all petitions and other matters presented to their several Courts.

XXVI

Letters testamentary or of administration with the will annexed and bonds in cases of noncupative or lost wills are to follow the general forms of letters testamentary and of administrations with the will annexed and bonds prescribed in other cases of testate estates.

XXVII

All depositions shall be opened and filed by the Register at the term for which they were taken; and if the matters in which they are to be

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used shall be continued, such depositions shall remain on file and be open to all objections when offered at the trial or hearing as at the return term, and all depositions shall remain on file at least fourteen days; the party producing a deposition may then withdraw it by leave of Court, in which case it shall not be used by either party.

XXVIII

When written evidence is in the hands of an adverse party no evidence of its contents shall be admitted unless previous notice to produce it on trial or hearing shall have been given to such adverse party, or his attorney, and comments by counsel upon a refusal to produce it will not be allowed without first proving such notice.

XXIX

In cases of contested wills and accounts, on motion of the proponent or accountant, the party objecting may be required to file specifications of the grounds of the objection before the day of hearing, but amendments thereto may be filed by leave of the court, upon such terms as may be deemed reasonable, but not without granting a continuance, if requested by the proponent or accountant, and in such cases the hearing shall be confined to the grounds of objection specified.

XXX

In cases of license to sell real estate at private sale or to exchange real estate, a certificate, under oath, of such sale or exchange should be filed in the Registry of Probate within thirty days, showing the amount received or the real estate taken in exchange, and the person to whom sold or with whom exchanged.

XXXI

No private claim on an administrator, executor, trustee, guardian of an adult or conservator of an estate shall be allowed in his account unless particularly stated in writing, and notice of such claim included in the notice on said account.

XXXII

Wills must in every case be proved and allowed in open court and in term time, and in case the testimony of the witness or witnesses proving the will is not taken down by the court stenographer and certified, the testimony shall be preserved by an affidavit taken before the Judge or Register, and filed with the other papers in the case.

XXXIII

All personal surety bonds, when presented for approval, should bear on the back thereof a certificate of a justice of the peace or notary public of the following tenor.

I hereby certify that I have made due inquiry into the financial standing of the sureties on the within bond, and find them to be jointly worth, above their liabilities, the sum of $..... I therefore recommend the acceptance and approval of the within bond.

.....
Justice of the Peace

.....
Notary Public

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XXXIV

When letters testamentary or of administration are granted without bond, the Judge may direct that letters shall not issue from the probate office and in such cases no certificate of appointment shall issue until twenty days shall have elapsed after date of the decree.

XXXV

When claims are filed in the probate office verified as required by law, the Register shall forthwith give notice of such filing by mail to the administrator or executor of the estate.

XXXVI

Petitions for administration filed for notice and petitions for probate of wills shall contain the addresses of the widow or widower and of the heirs at law and next of kin of deceased so far as known to the petitioner, and the Register shall give notice, by mail, of the filing of said petition to all persons whose addresses are so given, at least seven days before the return day.

XXXVII

Letters of administration and letters testamentary shall be accompanied with a warrant to appraisers and shall not issue until appraisers are appointed. The warrant need not be recorded until returned, but the fact of issue shall be entered on the docket.

XXXVIII

All petitions by foreign administrators, executors, guardians, conservators or trustees, for license to collect or receive personal property, and all petitions by foreign administrators, executors, guardians or conservators to sell real estate shall be filed in the Registry of Probate in duplicate and the Register shall forward to the attorney general one copy by mail seven days at least before the return day.

XXXIX

The petition for the reduction of the penal sum of any bond signed by a surety company as surety will not be granted until the principal on such bond has filed and settled his account in court.

XL

Service of all petitions filed in the Probate Court by a husband or wife, for desertion, under the provisions of Chap. 328 of the public laws of 1915, shall be by a copy of the petition and order of court thereon, fourteen days at least before the same is returnable. If the residence of the party is known or can be ascertained, actual notice shall be obtained; otherwise notice shall be given in such manner and by such means as the Court may order.

XLI

Rule days in equity proceedings in the Probate Court shall be the first day of each term of the Probate Court, as held in the different counties in the State.

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XLII

The equity rules of the Supreme Judicial Court of the State shall be the rules for equity proceedings in the Probate Courts, so far as the same are applicable thereto.

XLIII

Causes in equity shall be begun by bill or petition filed in the Register's office, upon which subpœna shall issue as a matter of course, returnable on a rule day of the Probate Court of the county in which the bill or petition is filed, held within sixty days after the filing of such bill or petition. In all cases service shall be made by a copy of subpœna and bill or petition attested by the Register. The Court may order such further or other notice as the Judge considers necessary.

Form 7. Declaration or Deed of Trust

This declaration of trust executed this 23rd day of December, 1920, between Morgan A. Ryan of East Orange, New Jersey, grantor, and the Union Trust Company of Newark, New Jersey, a corporation duly organized under the laws of New Jersey, trustee:

WITNESSETH, that said grantor in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, does hereby assign, transfer and set over to said trustee, its successors and assigns all and singular the following described stocks and bonds:

(Insert descriptive inventory)

To have and to hold the said described property to said trustee, its successors and assigns

In trust for the following uses and purposes:

1. To hold, control and manage the said property, to invest and reinvest the same and to collect and to receive the issues, income, interest, dividends and profits thereof, and after paying all proper charges and expenses including the legal fees allowed trustees under the laws of the state, to pay over said net income in quarterly payments to the following persons:

To Janet B. Ryan, the wife of the grantor, one-fourth of the total of said net income during the term of her life.

To Margaret E. Ryan, daughter of grantor, or her heirs, during the life of her mother, one-fourth of the said net income.

To the grantor one-half of said net income during his life.

2. Upon the death of the said Janet B. Ryan, the one-half in value of the entire amount of said property shall be assigned, transferred and delivered by said trustee to grantor's daughter, Margaret E. Ryan, or to her heirs if she should not then be living.

3. Upon the death of grantor one-half of the value of the entire amount of said property shall be assigned, transferred and delivered to grantor's son, Roy C. Ryan of Brooklyn, New York, or his heirs.

4. The trustee shall receive such compensation for its services as is prescribed by the statute law of New Jersey for executors or trustees for like services.

5. The trustee accepts the trust hereby declared and acknowledges receipt of the stocks and bonds herein scheduled subject to the trusts as herein declared and set forth.

(The customary individual and corporate attestation and notarial acknowledgment.)

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The foregoing is rendered in the simplest form to illustrate the principles involved. In an actual transaction the trustee, if a banking corporation, would want provisions giving it a certain latitude in selling and reinvesting and releasing it from liability for losses not caused by its default or neglect. Competent legal assistance is necessary to draw up any instrument creating a trust. Any amateur work in this direction will prove costly later.

Form 8. Petition for Probate

STATE OF MAINE

To the Honorable, the Judge of the Probate Court in and for the County of.....*Kennebec*.....

RESPECTFULLY REPRESENTS .....

.....

.....*Henry J. Stimson*.....

.....

of.....*Waterville*....., in said County, ...*and*.....that.....*the said Henry J. Stimson*.....who last dwelt in.....*Waterville*.....in said County,.....died on the...*fourteenth*...day of....*April*....A. D. 1921.., testate, possessed of estate remaining to be administered, leaving ....*a widow*...., whose name is....*Anne L. Stimson*....and as....*his* ....only heirs-at-law, and next of kin, the persons whose names, residences and relationship to the deceased are as follows, viz:

Names	Residence	Relationship
.....	.....	.....
..*Henry J. Stimson, Jr*..	...*Oakland, Maine*.....	.....*Son* .....
..*Mary S. Cope*.....	...*Waterville, Maine*...	.....*Daughter* .....
..*Jane E. Stimson*.....	....*Waterville, Maine*...	.....*Daughter* .....
.....	.....	.....

That your petitioner.....is.....

.....*Charles M. Curry*.....

the executor....named in the Will of said deceased..*Henry J. Stimson*...

Wherefore....he....prays....that said Will....*of Henry J. Stimson*....which is....herewith presented, may be proved and allowed, and that Letters Testamentary issue to....*Charles M. Curry*....named therein.

Your petitioner....further prays that such Letters may be issued to said Executor....without giving bond, in accordance with the request of said testator....as expressed in said instrument.

Dated this....*twenty-sixth*....day of....*April*,....A. D. 1921..

.....

.....*Charles M. Curry*.....

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STATE OF MAINE

Knox, ss.

Subscribed and sworn to this....*twenty-sixth*....day of....*April*.... A. D. 19*21*..

Before me,.....*James R. Newhall*.....Notary Public.
Justice of the Peace.

Form 9. Order for Issuance of Citations in Foreign Jurisdictions

At Chambers of the Surrogates' Court held in and for the County of New York, at the Hall of Records, in the County of New York, on the.....*21st*..... day of....*June*....in the year nineteen hundred and *twenty-one*.

PRESENT,

HONORABLE *Justice Blank*, SURROGATE.

In the Matter of Proving the Last Will and Testament of
John Smith
Deceased,
As a Will of Real and Personal Property.

Upon filing the verified petition of.....*Henry Smith*..... executor named in the last will and testament of.....*John Smith*..... late of.....*the County of New York*.....deceased, by which the petitioner has made proof to my satisfaction that..... the persons hereinafter named are heirs and next of kin of said....*John Smith*.....deceased, and are....*not*....residents of this state and that personal service of the citation herein cannot with due diligence be made upon.....*them*.....within the state ;

Now, on motion of.....*Thomas White*.....attorney for the said petitioner.....*Henry Smith*.....

ORDERED: that the service of the citation in the above-entitled matter upon the persons hereinafter named be made by publication thereof in two newspapers, to wit, in the New York Law Journal and in the *New York Times*, both published in the County of New York, once a week for four successive weeks; or, at the option of the petitioner, by delivering to and leaving with each of the persons hereinafter named in person a true copy of the citation without the state.

AND IT IS FURTHER ORDERED AND DIRECTED, that on or before the day of the first publication, the petitioner deposit in the post office at the County of New York, a copy of the citation, contained in a securely closed post-paid wrapper directed to each of the following persons respectively, at the places designated below:

John Smith, Jr.	*1664 Park Ave., Los Angeles, Cal.*
Alice Smith	*1664 Park Ave., Los Angeles, Cal.*
Helen Edwards	*124 Fifth Street, Columbus, Ohio*
Robert Storm	*648 Madison St., Toledo, Ohio*
Gertrude Storm	*648 Madison St., Toledo, Ohio*

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Form 10. Order for Citation Within Jurisdiction

THE PEOPLE OF THE STATE OF NEW YORK,

BY THE GRACE OF GOD, FREE AND INDEPENDENT,

To

John Smith, Jr., Alice Smith, Helen Edwards, Robert Storm, and Gertrude Storm

the.....*sole*.. ..heirs and next of kin of.....*John Smith*.....deceased, SEND GREETING:

WHEREAS,.....*Henry Smith*.. ..who resides at.....*435 West Second Street*....., the City of New York, has lately applied to the Surrogates' Court of our County of New York, to have a certain instrument in writing, relating to both real and personal property, duly proved as the last will and testament of.....*John Smith, deceased,*.....who was at the time of his....death a resident of.....*the city and*.....County of New York.

THEREFORE, you and each of you are cited to show cause before the Surrogates' Court of our County of New York, at the Hall of Records, in the County of New York, on the.....*5th*.....day of.....*July*..... one thousand nine hundred and *twenty-one* at half-past ten o'clock in the forenoon of that day, why the said will and testament should not be admitted to probate as a will of real and personal property.

IN TESTIMONY WHEREOF, we have caused the seal of the Surrogates' Court of the said County of New York to be hereunto affixed.

WITNESS, Honorable.....*Justice Blank*..... a Surrogate of our said County of New York, at said County, the.....*twenty-first*.....day of.....*June*,..... in the year of our Lord one thousand nine hundred and *twenty-one*.

[L. S.]

Robert Wood, Clerk of the Surrogates' Court.

NOTE—The original citation must be returned to the Probate Clerk before one o'clock P. M. on the day preceding the return day, with sworn proof of service.

Form 11. Waiver of Citation

SURROGATES' COURT,
COUNTY OF NEW YORK.

In the Matter of Proving the Last Will and Testament of .....*John Smith*..... Deceased, As a Will of Real and Personal Property	WAIVER OF CITATION.

I, ...*Samuel Smith*.....
.....
.....
the undersigned, ...an heir of and next of kin of .....*John Smith*....., deceased, do hereby.....appear in person and waive the issue and service of a citation in the matter of proving the last will and testament of said deceased, bearing date...*May 15, 1921*.

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Dated.....*October*..... } .....*Samuel Smith*.....
.....*1*....., 1921. }

Signed in the presence of
.....

State of.....*New York*..... } *ss.:*
County of.....*New York*..... }

BE IT KNOWN, that on the.....*1st*.....day of.....*October*....., one thousand nine hundred and.....*twenty-one*.....before me.....*James Orr*....a....*Notary Public*....in and for the State of....*New York*...., duly commissioned and sworn, residing in the....*Borough of Manhattan* personally came and appeared....*Samuel Smith*.....*of the City, County and State of New York*..... to me personally known, and known to me to be the same person described in and who executed the above waiver and.....*he*....duly.... acknowledged that....*he*....executed the same.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal of office, the day and year last above written.

.....*James Orr, Notary Public*.....
.....*N. Y. Co. No. 16789*.....
.....*Comm. Expires Oct. 1, 1922*.....

Form 12. Letters Testamentary

THE PEOPLE OF THE STATE OF NEW YORK,

BY THE GRACE OF GOD FREE AND INDEPENDENT,
TO ALL TO WHOM THESE PRESENTS SHALL COME OR WHOM THEY MAY CONCERN.

SEND GREETING:

KNOW YE, That at the County of New York, on the.....*fifth*..... day of.....*May*....., in the year of our Lord one thousand nine hundred and.....*twenty-one*....., before HONORABLE.....*J. P. Cohalan*..... a Surrogate of our said county, the LAST WILL AND TESTAMENT of..... .....*James H. Chester*..... deceased, was proved, and is now approved and allowed by us; and the said deceased.....*James H. Chester*,.....having been at the time of .....*his*.....death a resident of the County of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testat*or* and also the auditing, allowing and final discharging the account thereof doth belong unto us, the administration of all and singular goods, chattels and credits of the said deceased in any way concerning....*his*.... will, is granted unto.....*Charles A. Brown*..... execut*or* in the said will named,.....*he*.....being first duly sworn, well, faithfully and honestly to discharge the duties of such execut*or*.

IN TESTIMONY WHEREOF, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

WITNESS, HONORABLE.....*J. P. Cohalan*....., a Surrogate of our said County of New York at said

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SEAL

county the.....*twentieth*.....day of.....*May*....., in the year of our Lord one thousand nine hundred and *twenty-one*.

.....*H. R. Price*.....
Clerk of the Surrogate's Court.

Letters of administration are so nearly like the above, that they have not been included herein.

Form 13. Oath of Executor

SURROGATES' COURT,
COUNTY OF NEW YORK,

In the Matter of Proving the Last Will and Testament of
.....*John Jones*.....
Deceased,
As a Will of Real and Personal Property.

OATH OF EXECUTOR.
This oath may be taken before a Notary Public or a Commissioner of Deeds.

COUNTY AND STATE OF NEW YORK, ss.:

I, ...*Richard Brown*.....*of the County of New York*..... executor....named in the last will and testament of.....*John Jones*..... late of....*the City and*.....County of New York, deceased, do depose and say that I am a resident of No.....*1010 West 13th Street*..... in the Borough of.....*Manhattan*.....in the City and State of New York; that I am a citizen of the United States and am over twenty-one years of age, and that I will well, faithfully and honestly discharge the duties of executor....of said last will and testament.

.....*Richard Brown*.....

Sworn to this.....*10th*.....day of.....*September*.....1921

.....*James Orr, Notary Public*.....
N. Y. Co. No. 16789.
Comm. Expires, Oct. 1, 1922.

Form 14. Renunciation

The form for renunciation of the office of executor differs, of course, where the statutes vary, but the form generally used will run about as follows:

.....COURT

(*Title*)

I, (*Name of Executor*) of (*Name of City or Town*) of the State of (*Name of State*), Executor(*trix*) appointed in and by the last will and testament of (*Name of Testator*), late of the (*City or Town*) of (*Name*), County of (*Name*), deceased; do hereby renounce said appoint-

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ment and all right and claim to letters testamentary of and under said last will and testament, or to act as Executor(*trix*) thereof.

Dated this.....day of....., 19..

.....

(Person renouncing signs here.)

Attest:

(Notarial acknowledgment in usual form.)

Form 15. Petition for Revocation of Letters

SURROGATE'S COURT,
COUNTY OF.....

(*Title*)

To the Surrogate's Court of the County of.....

The petition of.....respectfully shows:—

I. That your petitioner resides in.....and is.....
(Describe petitioner as required by the law; either as creditor or person interested. If the latter, state character of interest, such as legatee, next of kin, etc.)
of.....late of.....deceased *(Here specify whether decedent died testate or intestate; if testate, allege probate of the will and liber of record, and the issuance of letters testamentary; if intestate, allege that fact and issuance of letters of administration.)*

II. *(Here state the grounds for asking the revocation of letters testamentary or of administration. As for example:)*

That at the time the aforesaid letters were issued to the said..... he was incompetent or disqualified by law to act as such, and the objection was not taken by your petitioner *(or by any person whom he represents)* upon the hearing of the application for letters, and that the facts by reason of which he was incompetent or disqualified by law to act as such executor or administrator were *(Here allege facts.)* *(If the ground for revocation is any of the other grounds specified by the law, make the allegation primarily and substantially in the language of the law, and then add the specific facts, concisely stated, constituting the alleged disqualification or ground for revocation of letters.)*

WHEREFORE, your petitioner prays for a decree revoking the said letters testamentary *(or of administration)* and that the said..... executor *(or administrator)* may be cited to show cause why a decree should not be made accordingly. *(It is proper to pray in a necessary case for an order temporarily restraining the representative from acting in the meantime.)*

(Signature)

(Verification)

Form 16. Form of Bond of Executor or Administrator

KNOW ALL MEN BY THESE PRESENTS, That I,.....
.....*Henry Smith,*.....*of the City, County*
.....*and State of New York,*.....

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am held and firmly bound unto The People of the State of New York in the sum of.....*Twenty Thousand*.....Dollars, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the.....*6th*.....day of.....*July*.....one thousand nine hundred and *twenty-one*.

THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above bounden.....*executor*,.....*Henry Smith*..... shall faithfully execute the trust reposed in ....*him*....as executor of the last will and testament of.....*John Smith*.....deceased, and obey all lawful decrees and orders of the Surrogates' Court of the County of New York touching the administration of the estate committed to .....*his care*.....then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

.....*Russell Knox*.....[L. S.]
.....*James Tompkins*.....[L. S.]
.....[L. S.]
.....[L. S.]

I know the within-named sureties to be the identical persons that they represent themselves to be, and to be responsible parties, and I believe them to be worth at least $....*10,000*....each in good property.

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.:

.....*Russell Knox*.....being duly sworn, deposes and says that he is one of the sureties named in the annexed recognizance; that he resides at No.....*648 Pine*.....Street in the.....*Borough of Manhattan*.....that he is a....*land*....holder, and that he owns the following property, consisting of.....*two houses, and two and one-half acres of land, at Nos. 10, 12, and 14, Terrace Way, Garden City, L. I.*,..... and that the same is of the value of not less than...*Fifteen Thousand*... Dollars and is subject to no incumbrance except a mortgage of....*Three Thousand Dollars*.....and that there are no unsatisfied judgments or

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executions against him, and that he is under no recognizance, nor is he upon any bond, undertaking or written obligation whatever.

.....

and that he is worth in good property, exclusive of property exempt by law from levy and sale under an execution, not less than.....*Twelve Thousand*.....Dollars over and above all debts, liabilities and lawful claims against him, and all liens, incumbrances and lawful claims upon his property.

Sworn to before me, this....*8th*....day of.....*July*.....1921, } ....*Russell Knox*.....Surety.
.....*James Orr, N. P*.....

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.:

.....*James Tompkins*.....being duly sworn, deposes and says that he is one of the sureties named in the annexed recognizance; that he resides at No.....*912 Madison Ave*.....in the....*Borough of Manhattan* that he is a....*land*....holder, and that he owns the following property, consisting of....*one building of twelve stories, at 708 Vesey Street, New York City*,.....and that the same is of the value of not less than .....*$100,000*.....Dollars, and is subject to no incumbrance except a mortgage of.....and that there are no unsatisfied judgments or executions against him, and that he is under no recognizance, nor is he upon any bond, undertaking or written obligation whatever.

.....

and that he is worth in good property, exclusive of property exempt by law from levy and sale under an execution, not less than....*One Hundred Thousand*.....Dollars over and above all debts, liabilities and lawful claims against him, and all liens, incumbrances and lawful claims upon his property.

Sworn to before me, this....*8th*....day of.....*July*.....1921, } .*James Tompkins*.....Surety.
.....*James Orr, N. P*.....

COUNTY OF NEW YORK, ss.:

On this.....*8th*.....day of.....*July*.....1921, before me came .....*Russell Knox and James Tompkins*,.....

.....

to me known to be the individuals described in and who executed the within bond*s*, and acknowledged that they executed the same.

.....*James Orr, Notary Public*.....
N. Y. Co. No. 16789.
Comm. Expires, Oct. 1, 1922.

Form 17. Inventory

STATE OF MAINE

KNOX, ss. .....
To..... PROBATE COURT.

.....

.....in said County,.....disinterested person , GREETING.

You are appointed to appraise, on oath, according to the value thereof at the date of death of deceased, the Real Estate, Goods and Chattels,

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Rights and Credits, which are by law to be administered, of which .....late of.....in said County of Knox, died seized or possessed, in said County,..... or any other County within the State,..... to be shown you by the Administrat.....Execut..... Trustee of the Estate Will.....of said deceased.

When you have performed that service you will deliver this Warrant, with your doings in pursuance thereof to the Administrat..... Execut.....Trustee of said Estate Will.....who is to return the same into Probate Court within three months from the date thereof.

Witness, OSCAR H. EMERY, Esquire, Judge.....of said Court at.....this.....day of.....in the year of our Lord one thousand nine hundred and.....

.....Register.

KNOX, ss. .....A. D. 19....

The above named.....personally appeared before me, and made oath that... .....would faithfully and impartially perform the duty required by the foregoing Warrant.

.....Justice of the Peace.
Notary Public.

Pursuant to the foregoing Warrant,.....have appraised said estate as follows, to wit:

Real Estate, - - - - - -	$.....
Goods and Chattels, - - - - -	$.....
Rights and Credits, - - - - -	$.....
Total,	$.....

Amount which in.....judgment may be realized from said rights and credits, exclusive of expenses and risks of collection, $.....

.....
.....
.....
} Appraisers.

.....Adm.
Exr.

STATE OF MAINE

KNOX, ss. .....A. D. 19....

Then personally appeared.....of said estate,.....and made oath that the following Schedules contain a true Inventory of all the estate of said.....that has come to..... possession or knowledge.

.....Justice of the Peace.
Notary Public.

PROBATE COURT.

KNOX, ss. .....A. D. 19....

Ordered that the foregoing Warrant and return thereon, and the Inventory or Schedules following be accepted and filed.

.....Judge of Probate.

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SCHEDULE OF REAL-PERSONAL-ESTATE.

Form 18. Notice of Appointment of Appraisers

To all persons interested in the estate of....., late of the City (or Town) of....., County of....., State of....., deceased:

Notice is hereby given that the undersigned, as the Executor (or Administrator) of the estate of said deceased, with the aid of the appraisers appointed by the Surrogate of said County, will on the..... day of....., 19...., at.....o'clock in the.....noon at the late residence of the said deceased, in said City (or Town), proceed to make an appraisement and inventory of all the goods, chattels, and credits of said deceased, according to law.

Dated this.....day of....., 19.....

.....

(Signed by Executor or Administrator)

Where the law of the state requires it, the above is a suggested form for the giving of notice to all concerned in the estate of the deceased, by the executor or administrator of the estate, that appraisers have been appointed by the court.

Form 19. Lawyer's Memoranda for Preparation of a Will *

I, ..., am a legal resident of the County of..... and State of.....

DISPOSITION OF PERSONAL EFFECTS

I desire to give all my personal effects, such as works of art, jewelry, silverware, library, clothing, etc., to the following persons:

	Relationship if any	Description of articles
Name Street Address City and State *(Repeat for each separate bequest.)*		

* Adopted from an effective form used by the Bankers Trust Company of New York City.

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Disposition of Cash and Securities

I desire to give cash and securities outright to the following persons or institutions:

	Relationship if any	Description of articles
Name Street Address City and State *(Repeat for each separate bequest.)*		

Disposition of Real Estate

I desire to devise my real estate to the following persons:
(If you wish your wife or other relative to have only the use, for life, of your residence or other real estate, please so indicate.)

	Relationship if any	Description of articles
Name Street Address City and State *(Repeat for each separate devise.)*		

Trusts To Be Established

I desire to establish the following trusts:

1. Name and address of person to whom income is payable	2. Relationship if any	3. Amount of principal	4. How do you wish income paid?
Name Street Address City and State			Semiannually Quarterly
5. How long do you wish the trust to run?	6. Upon expiration of trust principal is to be paid to the following person		7. Relationship if any
For life Or until age of..... *(Repeat form for each trust.)*	Name Street Address City and State		

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An Answer to the Following Questions Will Aid Your Attorney in Drawing Your Will

1. Is provision made for wife in lieu of dower?
2. Are legacies to be paid without deduction for inheritance taxes?
3. Specify whether legacies are to be paid in cash or in securities.
4. Is your executor or trustee to have full power to mortgage, lease, or exchange any and all real estate?
5. Is your trustee authorized to retain as part of trust estate any securities you own?
6. Is your trustee to be restricted to investments authorized by your state?
7. If he is not to be restricted, what class of securities is he to purchase?
8. Is your trustee to be authorized to pay all stock dividends and unusual dividends to the life beneficiary?
9. If securities are purchased at a premium, is your trustee required to set aside income to absorb the premium?
10. Name your executor (and trustee, if any).

Form 20. Appointment of Bank as Transfer Agent

(To be modified as required by circumstances.)

APPOINTMENT OF

BLANK NATIONAL BANK (OR TRUST COMPANY)

AS STOCK TRANSFER AGENT

WE HEREBY CERTIFY TO Blank National Bank (or Trust Company) that at a regularly convened meeting of the Board of Directors of....*the Richards & Roe*....Corporation, held on the...*4th*...day of....*June*...., 1921, the following resolutions were duly adopted:

RESOLVED, That Blank National Bank (or Trust Company) be and it hereby is appointed Transfer Agent to record upon the books of this Corporation the issue and transfer of its capital stock and to countersign certificates for all stock hereafter issued or transferred.

That said National Bank (or Trust Company) is hereby authorized as such Transfer Agent:

(1) to open and keep such transfer book or books as may be required by law or for its own convenience;

(2) to countersign certificates of stock in such names and for such number of shares as may be certified to it by the proper officers of this Corporation upon any original issue; and after such certificates have been countersigned also by the Registrar of this Corporation to deliver the same upon the written order of the....*President*....of this Corporation;

(3) to countersign certificates of stock for shares equal to the number of shares represented by certificates of stock surrendered for transfer and cancelled and when said new certificates have been countersigned also by the Registrar of this Corporation, to deliver the same to the persons presenting the surrendered certificates for transfer;

(4) to countersign any certificate of stock certified to be issued in lieu of a lost or destroyed certificate of stock and to deliver the

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same upon the written order of the.....*President*.....of this Corporation;

FURTHER RESOLVED, that said National Bank (or Trust Company) as such Transfer Agent may rely on the certificate of the President or a Vice-President and Secretary or an Assistant Secretary of this Corporation with respect to any matters relating to its duties as Transfer Agent; that it shall not be the duty of said National Bank (or Trust Company) to examine into the facts stated in any such certificate and that in acting in respect to certificates of stock believed by said National Bank (or Trust Company) to have been signed by officers of this Corporation authorized to sign the same and sealed with the corporate seal, this Corporation will hold said National Bank (or Trust Company) harmless against all liability.

FURTHER RESOLVED, that said National Bank (or Trust Company) may at any time withdraw from its appointment as Transfer Agent by giving thirty days notice in writing to this Corporation and by refunding such proportion of the compensation paid to it for acting as such Transfer Agent as shall not have been earned at the time such withdrawal becomes effective.

FURTHER RESOLVED, that said National Bank (or Trust Company) may apply to.....*R. J. Smith*.....of.....*New York*..... counsel for this Corporation or to its own counsel for advice with respect to any question relating to its duties as such Transfer Agent and this Corporation hereby undertakes to hold said National Bank (or Trust Company) harmless against all claims by whomsoever made on account of any act done in good faith in connection with said agency or of any failure to act, whether on advice of counsel or not, and agrees that said National Bank shall be liable only for its wilful default or gross negligence.

FURTHER RESOLVED, that the proper officers of this Corporation be and they hereby are directed and empowered to do any and all things necessary or desirable to effectuate the purposes of these resolutions, and in particular:

(1) to certify these resolutions and lodge them with said National Bank (or Trust Company);

(2) to keep said National Bank (or Trust Company) at all times supplied, as requested by it, with certificate of stock duly signed and sealed;

(3) to certify to said National Bank (or Trust Company) the facts with respect to any new issue of stock;

(4) to certify to said National Bank (or Trust Company) all acts and documents with respect to this Corporation which said National Bank may require and especially the facts respecting the issue of its outstanding stock and regarding any certificate proposed to be issued in lieu of a lost or destroyed certificate.

WE FURTHER CERTIFY:

(1) That.....*Browne & Greene*.....Company is the duly appointed and acting Registrar for the Stock of this Corporation;

(2) That this Corporation was chartered under the laws of the State of.....*New York*.....in the month of.....*May*....., 1919;

(3) That total authorized capital stock of this Corporation is: .....*Two Thousand*.....* shares of PREFERRED stock of the par

* Write out numbers.

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value of.....*One Hundred*.....dollars each, and.....*Three Thousand*....shares of COMMON stock of the par value of....*One Hundred*.... dollars each, making the total par value of its authorized capital stock .....*Five Hundred Thousand*.....dollars;

(4) That this Corporation has issued and outstanding at the present time:

.....*Fifteen Hundred*.....shares of PREFERRED stock and.....*Three Thousand*.....shares of COMMON stock, making the total par value of the stock now issued and outstanding.....*Four Hundred and Fifty Thousand*.....dollars;

(5) That the money or property for which the above mentioned shares were issued has been actually paid or conveyed, transferred and delivered to this Corporation;

(6) That the officers of this Corporation authorized to sign certificates of stock are the President or Vice-President and.....*Treasurer*.....or Assistant....*Treasurer*...., and no other officers have ever been authorized to execute certificates of stock;

That at the present time said officers are as follows:

President,	Mr.....*John Richards*.....
Vice-President,	Mr.....*R. J. Smith*.....
Treasurer,	Mr.....*Adam Roe*.....
Assistant *Treas.*	Mr.....*Ralph Hay*.....

WE FURTHER CERTIFY that we are delivering to you herewith the following, each identified by the autograph signature of the Secretary of this Corporation, viz:

(1) A copy of the charter or certificate of incorporation of this Corporation with all amendments, certified by the Secretary of State or other proper officer of the state in which this Corporation is incorporated;

(2) A true copy of the by-laws of this Corporation with all amendments;

(3) Specimen copies of all certificates of stock of this Corporation;

(4) Card or cards containing the names and genuine autograph signatures of the officers now authorized to sign certificates of stock of this Corporation;

(5) Card or cards containing the names and genuine autograph signatures of all former officers of this Corporation authorized to sign certificates of stock now outstanding and the offices filled by them respectively, together with the terms of their incumbency;

(6) Card or cards containing the genuine autograph signature of the Registrar of this Corporation authorized for use in countersigning certificates of stock of this Corporation.

IN WITNESS WHEREOF, we have signed these presents as President and as Secretary of this Corporation and have hereunto affixed the seal of this Corporation, the....*9th*....day of.....*June*....., 1921.

.....*John Richards*.....
President.

(Corporate Seal)

.....*James Street*.....
Secretary

Address of Corporation....*1491 John Street, New York City*.... ....

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Form 21. Appointment of Bank as Registrar

(To be modified as required by circumstances.)

APPOINTMENT OF

BLANK NATIONAL BANK (OR TRUST COMPANY)

AS REGISTRAR OF STOCK

WE HEREBY CERTIFY TO Blank National Bank (or Trust Company) that at a regularly convened meeting of the Board of Directors of....*the Richards & Roe*....Corporation, held on the...*4th*...day of....*June*...., 1921, the following resolutions were duly adopted:

RESOLVED, that Blank National Bank (or Trust Company) be and it hereby is appointed Registrar to countersign all certificates of stock of this Corporation hereafter issued or transferred and to register the issue and transfer thereof.

That said National Bank (or Trust Company) is hereby authorized as such Registrar:

(1) to open and keep such book of registration as may suit its convenience;

(2) to countersign and register certificates of stock for not to exceed the number of shares certified to it as the amount of any original issue;

(3) to register the transfer of stock of this Corporation and, when certificates of stock duly cancelled are presented for inspection by the Transfer Agent of this Corporation, to countersign as Registrar new certificates of stock for an equal number of shares;

(4) to register and countersign any certificate of stock certified to it to be issued in lieu of a lost or destroyed certificate;

(5) to return all certificates registered and countersigned by it to said Transfer Agent together with any cancelled certificates.

FURTHER RESOLVED, that said National Bank (or Trust Company) may rely upon the certificate of the President or a Vice-President and Secretary or an Assistant Secretary of this Corporation with respect to any matter relating to its duties as Registrar; that it shall not be the duty of said National Bank (or Trust Company) to examine into any issue or transfer of stock, the authority under which the same is made or the payment of any tax thereon, and that in acting in respect to certificates of stock believed by said Registrar to be signed by officers of this Corporation authorized to sign the same, sealed with the corporate seal and countersigned by said Transfer Agent, this Corporation will hold said National Bank (or Trust Company) harmless against all liability.

FURTHER RESOLVED, that said National Bank (or Trust Company) may at any time withdraw from its appointment as Registrar by giving thirty days notice in writing to this Corporation and by refunding such proportion of the compensation paid to it for acting as such Registrar as shall not have been earned at the time such withdrawal becomes effective.

FURTHER RESOLVED, that said National Bank (or Trust Company) may apply to.....*R. J. Smith*.....of.....*New York City*..... counsel for this Corporation or to its own counsel for advice in respect to any question relating to its duties as such Registrar and this Corporation hereby undertakes to hold said National Bank (or

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Trust Company) harmless against all claims by whomsoever made on account of any act done in good faith in connection with said agency or of any failure to act, whether on advice of counsel or not, and agrees that said National Bank shall be liable only for its wilful default and gross negligence.

FURTHER RESOLVED, that the proper officers of this Corporation be and they hereby are directed and empowered to do any and all things necessary and proper to effectuate the purposes of these resolutions and in particular to certify these resolutions and lodge them with said National Bank (or Trust Company) and to certify to said National Bank (or Trust Company) all facts and documents with respect to this Corporation which said National Bank (or Trust Company) may require.

WE FURTHER CERTIFY:

(1) That.....*Browne & Greene*.....Company is the duly appointed and acting Transfer Agent for the stock of this Corporation;

(2) That this Corporation was chartered under the laws of the State of.....*New York*.....in the month of.....*May*....., 1919;

(3) That total authorized capital stock of this Corporation is: .....*Two Thousand*.....* shares of PREFERRED stock of the par value of.....*One Hundred*.....dollars each, and.....*Three Thousand*..... shares of COMMON stock of the par value of.....*One Hundred*..... dollars each, making the total par value of its authorized capital stock .....*Five Hundred Thousand*.....dollars;

(4) That this Corporation has issued and outstanding at the present time:

.....*Fifteen Hundred*.....shares of PREFERRED stock and.....*Three Thousand*.....shares of COMMON stock, making the total par value of the stock now issued and outstanding.....*Four Hundred and Fifty Thousand*.....dollars;

(5) That the money or property for which the above mentioned shares were issued has been actually paid or conveyed, transferred and delivered to this Corporation;

(6) That the officers of this Corporation authorized to sign certificates of stock are the President or Vice-President and.....*Treasurer*.....or Assistant *Treasurer*, and no other officers have ever been authorized to execute certificates of stock;

That at the present time said officers are as follows:

President,	Mr.....*John Richards*.....
Vice-President,	Mr.....*R. J. Smith*.....
Treasurer,	Mr.....*Adam Roe*.....
Assistant *Treas.*	Mr.....*Ralph Hay*.....

WE FURTHER CERTIFY that we are delivering to you herewith the following, each identified by the autograph signature of the Secretary of this Corporation, viz:

(1) A copy of the charter or certificate of incorporation of this Corporation with all amendments, certified by the Secretary of State or other proper officer of the state in which this Corporation is incorporated;

* Write out numbers.

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(2) A true copy of the by-laws of this Corporation with all amendments;
(3) Specimen copies of all certificates of stock of this Corporation;
(4) Card or cards containing the names and genuine autograph signatures of the officers now authorized to sign certificates of stock of this Corporation;
(5) Card or cards containing the names and genuine autograph signatures of all former officers of this Corporation authorized to sign certificates of stock now outstanding and the offices filled by them respectively, together with the terms of their incumbency;
(6) Card or cards containing the genuine autograph signatures of the Transfer Agent of this Corporation authorized for use in countersigning certificates of stock of this Corporation.

IN WITNESS WHEREOF, we have signed these presents as President and as Secretary of this Corporation and have hereunto affixed the seal of this Corporation, the....*9th*....day of....*June*...., 1921.

.....*John Richards*.....
President.

(Corporate Seal)

.....*James Street*.....
Secretary.

Address of Corporation....*1491 John Street, New York City*.....

Form 22. Incineration Certificate of a Trust Company

INCINERATION CERTIFICATE

THIS IS TO CERTIFY that we have this day destroyed by fire in the furnace of the building known as the "Woolworth Building," 233 Broadway, New York City, the following described canceled bonds:

(Name of corporation)

First Mortgage 6%, 12 year Gold Bond
Due May, 1919

Numbers.....

Dated, New York.....1921.

THE FIRST NATIONAL BANK
By.....
Assistant Trust Officer.

Witnesses to Cremation

.....
Representative of The First National Bank

.....
Representing (Name of Corporation)

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Form 23. Certificate of Stock by Bank as Transfer Agent

(To be modified as required by circumstances.)

BLANK NATIONAL BANK (OR TRUST COMPANY)

TRANSFER AGENT

CERTIFICATION AS TO ORIGINAL ISSUE OF STOCK TO ACCOMPANY FORM NO. 2627

BLANK NATIONAL BANK (OR TRUST COMPANY),
New York City.

We, the undersigned,.....*John Richards*.....as President, and .....*James Street*.....as Secretary, respectively, of the....*Richards & Roe*....Corporation, pursuant to the resolutions of the Board of Directors of the said Corporation, adopted....*June 4th*.... 1921, appointing Blank National Bank (or Trust Company) the Transfer Agent of the stock of said Corporation, HEREBY CERTIFY that by resolution of the said Board of Directors, duly adopted on the....*4th*.....day of.....*June*...., 1921, an original issue of.....*Five Hundred**.....shares of preferred stock of the par value of.....*One Hundred*.....dollars each, and..... shares of common stock of the par value of.....dollars each, was duly authorized and we hereby certify that certificates in the following names and for the following number of shares may properly be issued under the authority of the said resolution authorizing such original issue, and you are hereby authorized and directed as such transfer agent to countersign said certificates in accordance with the terms of the resolutions appointing you said transfer agent:

PREFERRED STOCK

Name in which Certificate is to be Issued	Address	Number of Shares
Miles Ames.....	*6549 Wall Street*.....	*500*.....
.....	.....	.....
.....	.....	.....

(N. B. Any of the above space not occupied by names, addresses and numbers should be lined out with red ink.)

COMMON STOCK

Name in which Certificate is to be Issued	Address	Number of Shares
.....	.....	.....
.....	.....	.....

(N. B. Any of the above space not occupied by names, addresses and numbers should be lined out with red ink.)

We further certify that the money or property for which the shares to be represented by the certificates which you are herein authorized to countersign are to be issued, has been actually (or will have been) paid or conveyed, transferred and delivered to this Corporation.

The total number of shares of stock of this Corporation which you

* Write out numbers.

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are authorized to transfer, including the authorization above given and previous authorizations, is now.....*Five Hundred*.....shares of preferred stock of the par value of.....*One Hundred*.....dollars each, and .....shares of common stock of the par value of..... dollars each, making the total par value of the stock which you are now authorized to transfer.....*Fifty Thousand*.....dollars.

IN WITNESS WHEREOF, we have signed these presents as President and as Secretary of the said Corporation and have hereunto affixed the seal of the said Corporation, the....*9th*....day of.....*June*....., 1921.

.....*John Richards*.....
President.

.....*James Street*.....
Secretary.

(CORPORATE SEAL)

BLANK NATIONAL BANK (OR TRUST COMPANY),
New York City.

You are hereby ordered to deliver the certificates of stock described in the foregoing certificate, after countersignature by you and by the duly authorized Registrar of this Corporation, to the following named persons personally or by registered mail addressed to the addresses given below:
....*Miles Ames*.....*6549 Wall Street, New York, N. Y*.....
.....
.....

(N. B. Any of the above space not occupied by names, addresses and instructions should be lined out with red ink.)

Dated, ...*June 9th*,....., 1921. .....*John Richards*.....
As....*President*....of
.....*Richards & Roe*.....Corporation
(To be signed by the officer authorized to direct the delivery of the certificates by resolution appointing the Transfer Agent.)

(CORPORATE SEAL)

Form 24. Certificate of Stock by Bank as Registrar

(To be modified as required by circumstances.)

BLANK NATIONAL BANK (OR TRUST COMPANY) REGISTRAR

CERTIFICATION AS TO ORIGINAL ISSUE OF STOCK TO ACCOMPANY FORM NO. 2625

We, the undersigned.....*John Richards*....., as President, and .....*James Street*.....as Secretary, respectively, of the.....*Richards & Roe*....Corporation, pursuant to the resolutions of the Board of Directors of the said Corporation, adopted.....*June 4th*....., 1921, appointing the Blank National Bank (or Trust Company) Registrar of the stock of the said Corporation, HEREBY CERTIFY that by resolution of the said Board of Directors, duly adopted, on the.....*4th*.....day of.....*June*....., 1921, an original issue of.....*Five Hundred**.....shares of preferred stock of the par value of.....*One Hundred*.....dollars each, and of

* Write out numbers.

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.....shares of common stock of the par value of..... dollars each, was duly authorized and you are hereby authorized and directed as such Registrar, to countersign and register, as an original issue, in accordance with the terms of said resolutions under which you were appointed Registrar of said stock, certificates for not to exceed .....*Five Hundred*.....shares of preferred stock and..... shares of common stock, which we hereby certify may properly be issued under the authority of the said resolutions authorizing such original issue.

We further certify that the money or property for which the shares to be represented by the certificates which you are herein authorized to countersign and register are to be issued, has been actually (or will have been) paid or conveyed, transferred and delivered to this Corporation.

The total number of shares of stock of this Corporation which you are authorized to register, including the authorization above given and any previous authorizations, is now.....*Five Hundred*.....shares of preferred stock of the par value of.....*One Hundred*.....dollars each, and.....shares of common stock of the par value of..... dollars each, making the total par value of the stock which you are now authorized to register.....*Fifty Thousand*.....dollars.

IN WITNESS WHEREOF, we have signed these presents as President and as Secretary of the said Corporation, and have hereunto affixed the seal of the said Corporation, this.....*9th*.....day of.....*June*....., 1921.

.....*John Richards*.....
President.

.....*James Street*.....
Secretary.

(CORPORATE SEAL)

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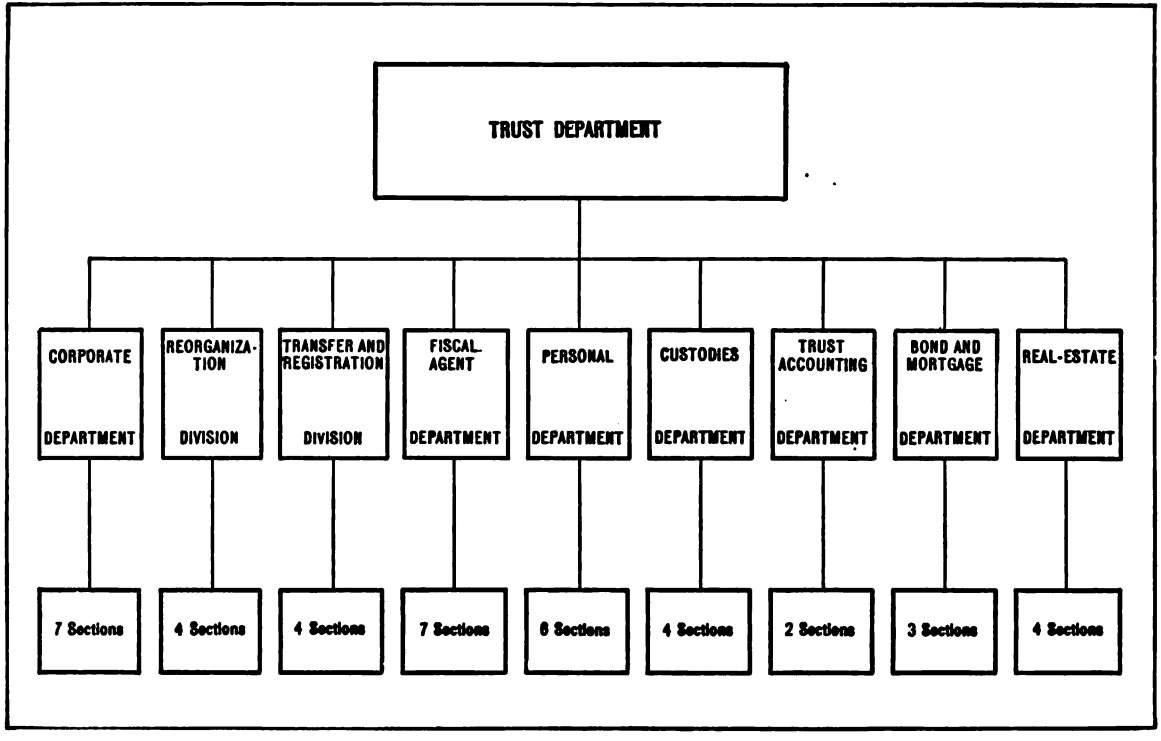
Form 25. (a) Chart Showing Formation of a Model Trust Department *



* See also charts inserted in Chapter LXII.

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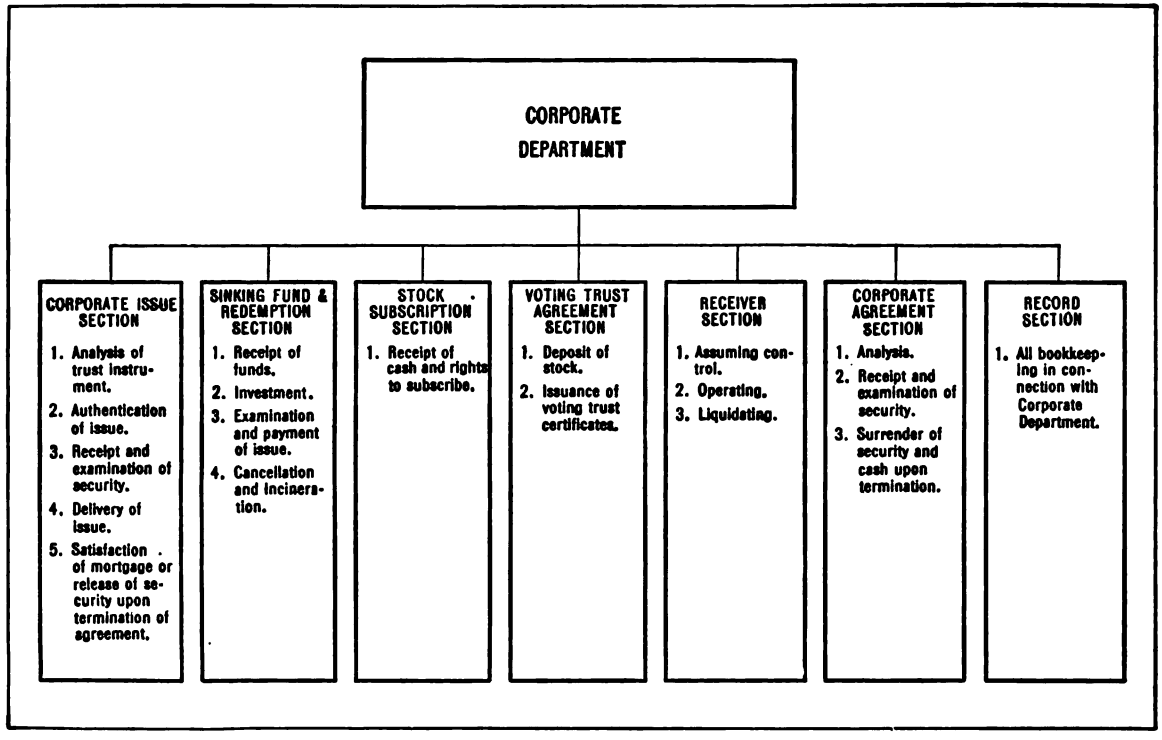
Form 25. (b) Chart Showing Formation of a Model Trust Department



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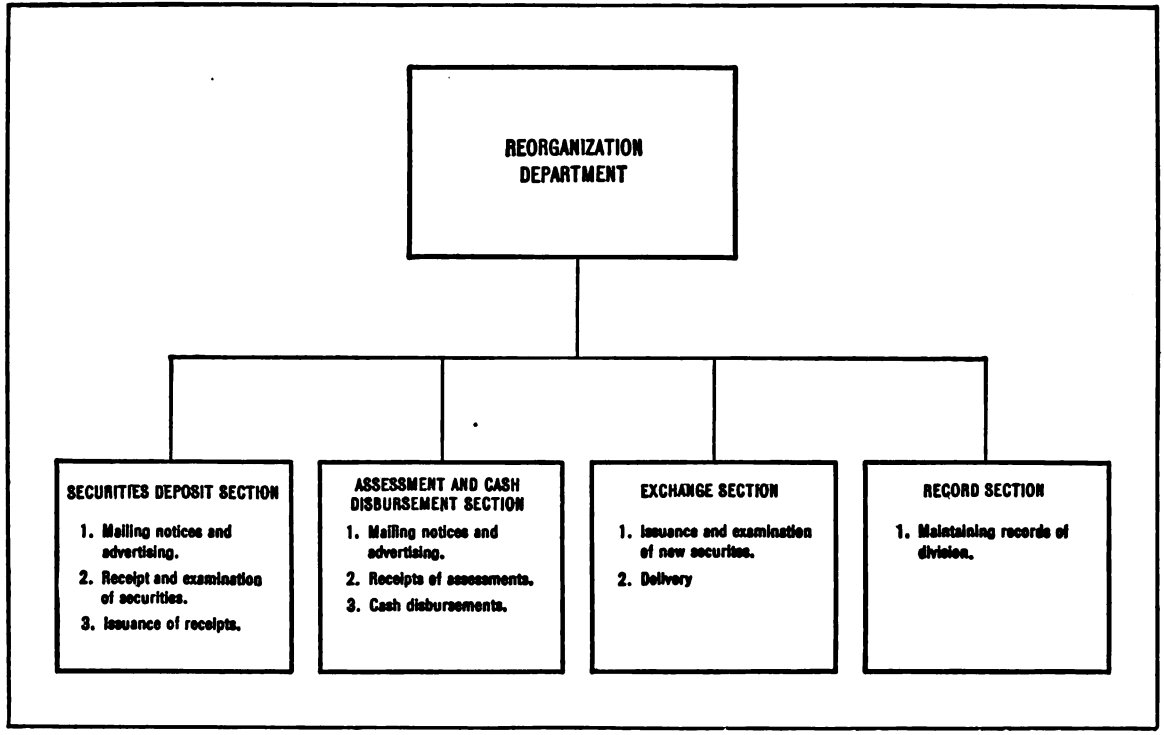
Form 25. (c) Chart Showing Formation of a Model Trust Department



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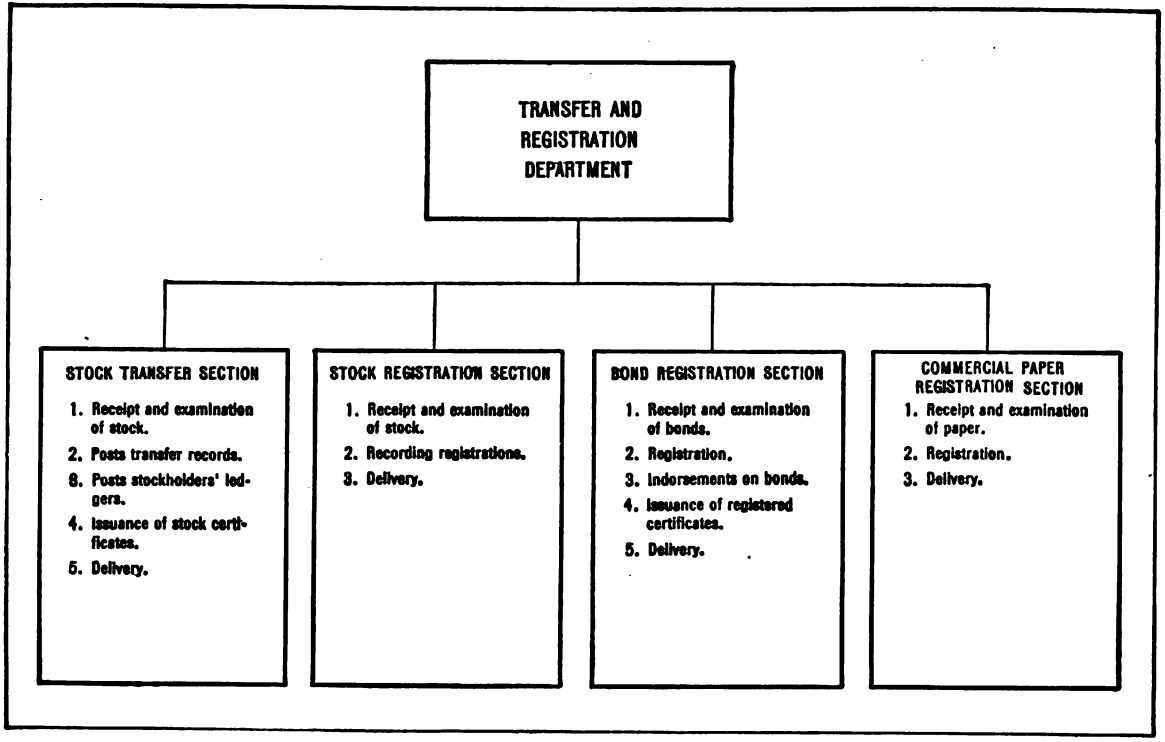
Form 25. (d) Chart Showing Formation of a Model Trust Department



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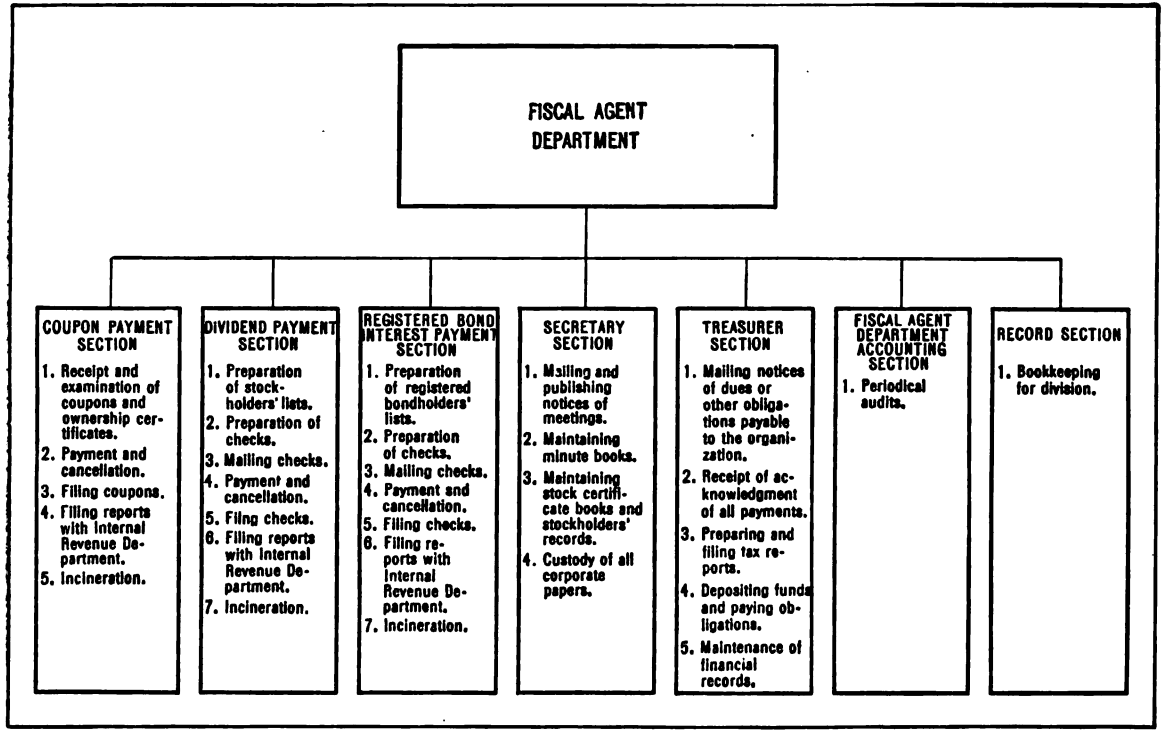
Form 25. (e) Chart Showing Formation of a Model Trust Department



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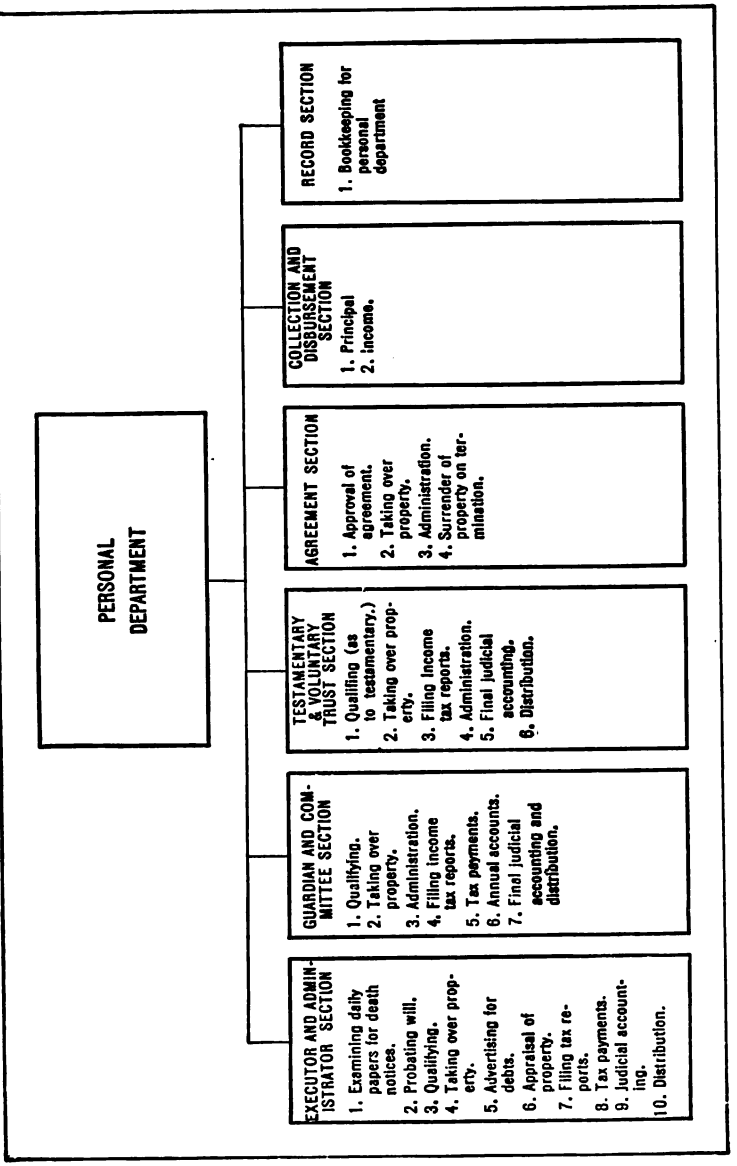
Form 25. (f) Chart Showing Formation of a Model Trust Department



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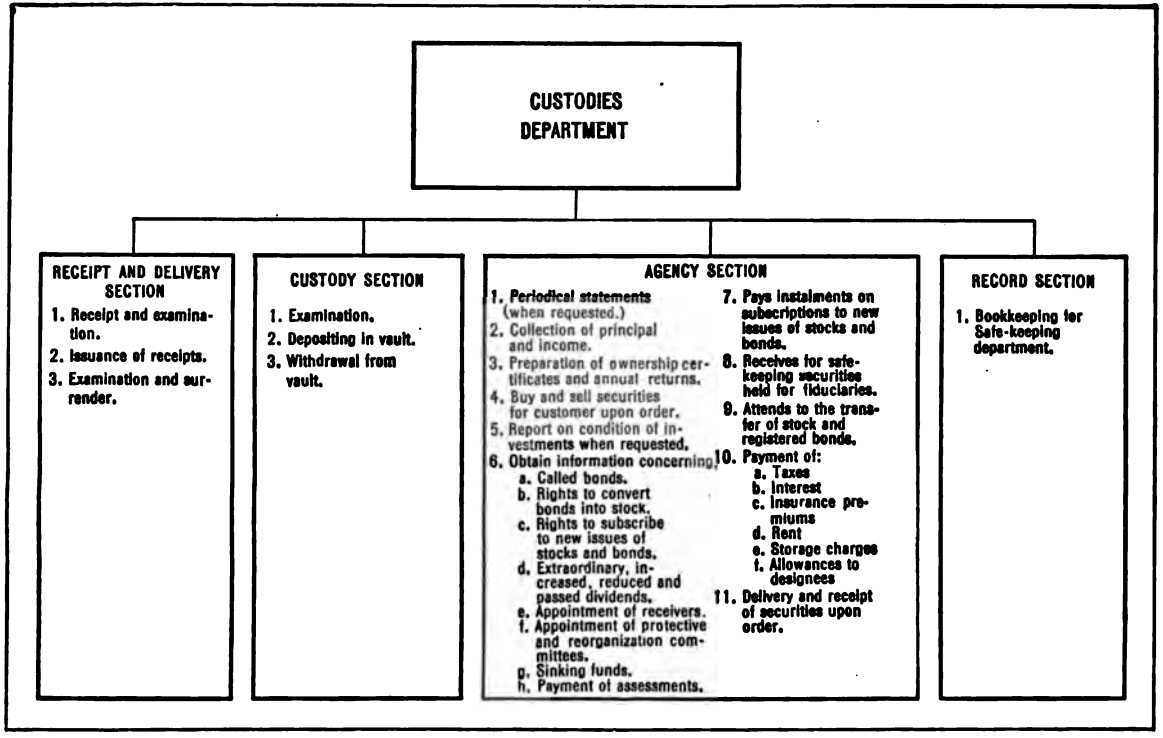
Form 25. (g) Chart Showing Formation of a Model Trust Department



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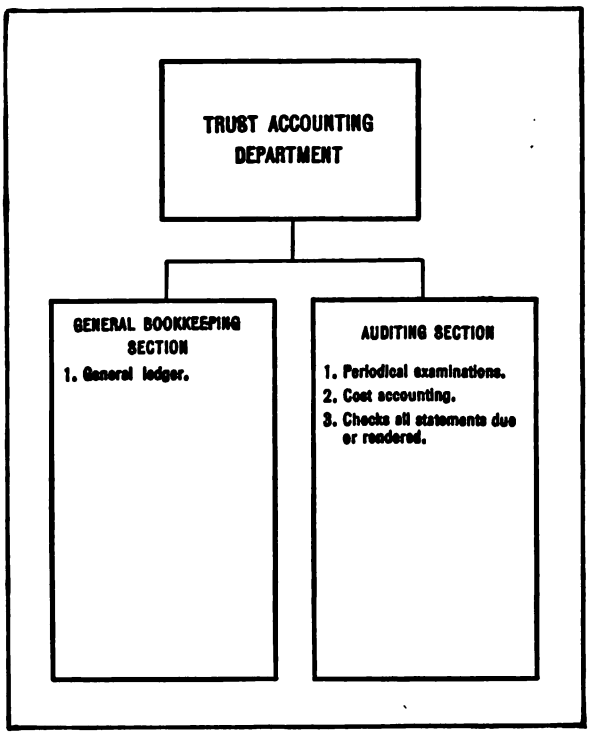
Form 25. (h) Chart Showing Formation of a Model Trust Department



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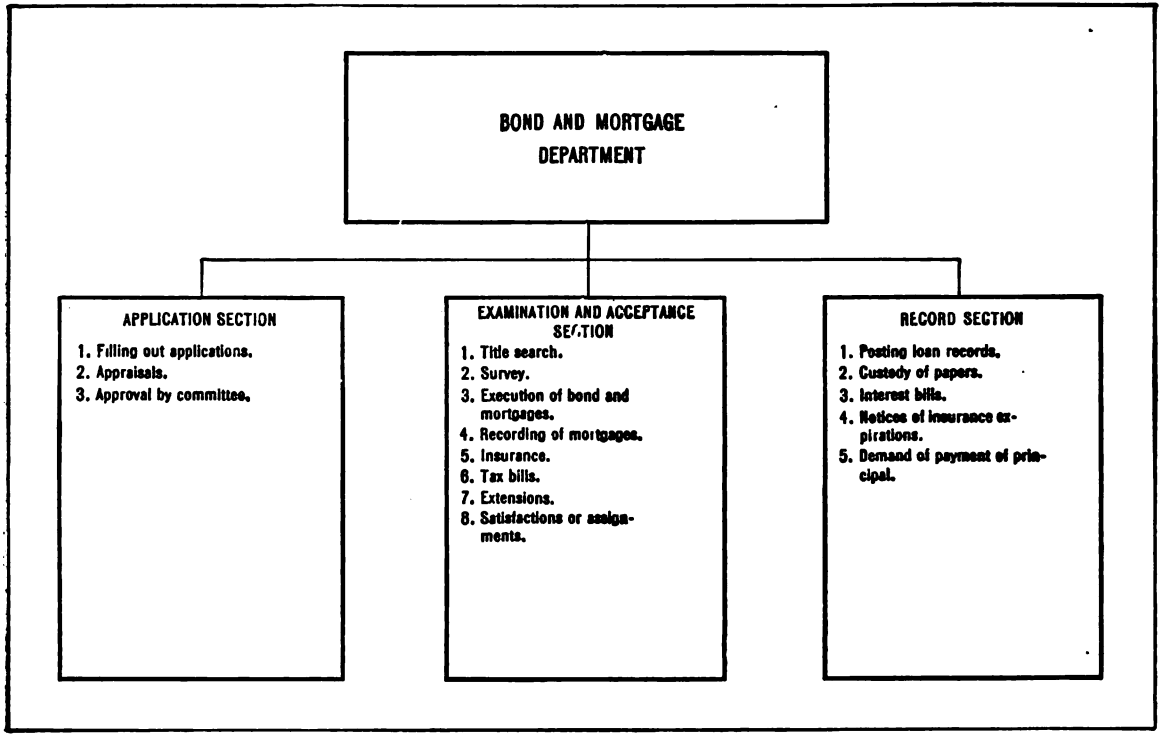
Form 25. (i) Chart Showing Formation of a Model Trust Department



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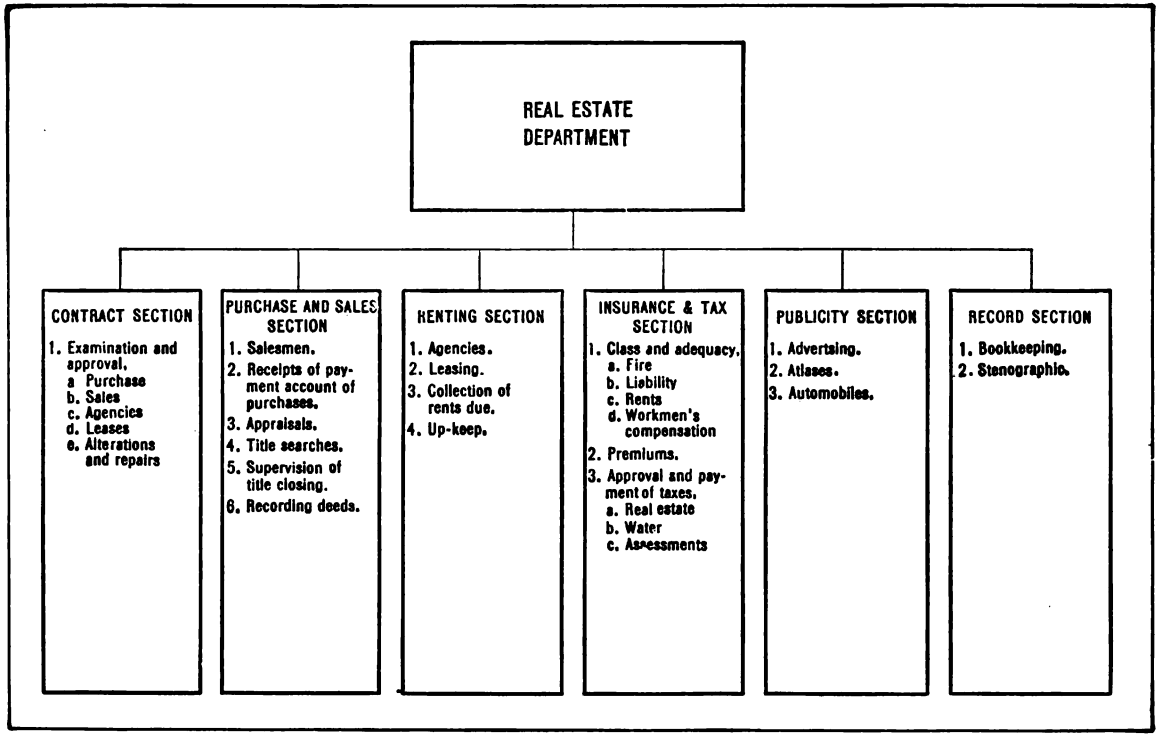
Form 25. (j) Chart Showing Formation of a Model Trust Department



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Form 26. (a) Synoptic for the Accounts of an Administrator (left half)

1. ESTATE OF HOMER W. SPEER

Entry No.	Sec Sections	Cash Montrose State Bank Dr.	Cash Montrose State Bank Cr.	Cash Savings Accounts Dr.	Cash Savings Accounts Cr.	Date	Name and Item	Check No.	Inventory Dr.	Inventory Cr.	Loss on Realization Dr.	Gain on Realization Cr.
						1919						
1	591, 596	$2,100.00				Oct. 16	American Carso Co., 7% dividend on stock			$2,100.00		
2	592		$ 10.40			Nov. 17	Clerk of probate court, certified copies of will and letters testamentary	1				
3	593, 596	9,136.28				18	Montrose State Bank, decedent's checking account			9,136.28		
4	593, 596			$3,000.00		18	Montrose Trust Co., decedent's savings account			3,000.00		
5	591, 596	5,117.69				20	Fellowship Life Insurance Co., principal and dividends, policy No. 11736			5,117.69		
6	594		1,000.00			21	Mrs. Marie Speer Williamson, advance on distribution	2				
7	593		500.00			22	Lewis and Salem, undertakers' bill	3				
8	595		14.97			23	James T. Holmquest, decedent's check No. 11397	4				
9	596					Dec. 11	Estate of Homer W. Speer, appraisal of assets		$73,230.57			
10	597		4,002.10			12	Treasurer of Morgan County, last half of 1918 taxes now due	5				
11	598			60.00		31	Montrose Trust Co., interest on savings account to date			35.00		
						1920						
12	598	250.00				Jan. 2	Amos Breslau, interest on mortgage note			145.83		
13	598	500.00				5	Gypsum Valley Co., coupons on bonds			291.67		
14	599		112.10			6	Henry T. Lewis, claim	6				
15	600		1,030.00			7	Peter Kane, mortgage note and interest	7				
16	601		231.12			Mar. 8	Collector of Internal Revenue, tax on decedent's income	8				
17	602	142.00				9	J. H. Hodges, two shares common stock of the Hodges Co.					
18	603			1,020.00		10	Montrose State Bank, savings account					
19	593		50.00			11	Manhattan Garage Co., repairs to automobile	9				
20	603	1,200.00				12	Luella M. Fry, 5-passenger Washington touring car			1,000.00		$200.00
21	594		700.00			12	John Speer, advance on distribution	10				
22	594	700.00				13	John Speer, Hendricks coupe			700.00		
23	604		2,000.00			Apr. 1	Treasurer of State, estimate of state inheritance taxes	11				
24	597		3,012.26			June 13	Treasurer of Morgan County, first half of 1919 taxes now due	12				
25	598	500.00				July 2	Gypsum Valley Co., coupons on bonds					
26	607	9,500.00				7	Second National Bank, sale of Gypsum Valley Co. bonds			9,000.00		500.00
27	607		6,000.00			7	Second National Bank, payment of note					
28	608					7	Second National Bank, deferred interest on above note			349.68		
29	610	2,100.00				Oct. 2	American Carso Co., 7% dividend on stock					
30	611	2,448.00			$3,060.00	Nov. 29	Montrose Trust Co., full settlement on liquidation				$ 600.00	
31	612	3,000.00				30	National Fire Insurance Co., settlement under policy No. 19685			5,650.00	2,650.00	
32	608					30	National Fire Insurance Co., prepaid insurance on above policy			42.22		
33	597		3,012.26			Dec. 13	Treasurer of Morgan County, second half of 1919 taxes now due	13				
34	604	102.02				14	Treasurer of State, refund of excess inheritance taxes					
		$36,795.99	$21,675.21	$4,080.00	$3,060.00				$73,230.57	$36,568.37	$3,250.00	$700.00

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Form 26. (b) Synoptic for the Accounts of an Administrator (right half)

SYNOPTIC

1.

Entry No.	Sec	Sections	Assets not in Inventory	Funeral and Administration Expenses		Debts of Decedent	Distribution of Assets Other than Cash	Distribution of Corpus Cash		Estate Corpus	Income	Loss on Income	Expense, Income	Distribution of Income
			Cr.	Dr.	Cr.	Dr.	Dr.	Dr.	Cr.	Cr.	Cr.	Dr.	Dr.	Dr.
1		591, 596												
2		592		$ 10.40										
3		593, 596												
4		593, 596												
5		591, 596												
6		594						$1,000.00						
7		592		500.00										
8		595				$ 14.97								
9		596								$73,230.57				
10		597				4,002.10								
11		598									$ 25.00			
12		598									104.17			
13		598									208.33			
14		599				112.10								
15		600				1,018.33							$ 11.67	
16		601				231.12								
17		602	$ 142.00											
18		602	1,011.67								8.33			
19		592		50.00										
20		603												
21		594						700.00						
22		594												
23		604						2,000.00						
24		597											3,012.26	
25		598									500.00			
26		607												
27		607				6,000.00								
28		608											349.68	
29		610									2,100.00			
30		611										$ 12.00		
31		612												
32		608											42.22	
33		597											3,012.26	
34		604							$ 102.02					
			$1,153.67	$560.40		$11,378.62		$3,700.00	$ 102.02	$73,230.57	$2,945.83	$ 12.00	$6,428.09	

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Form 27. Realization Account

REALIZATION ACCOUNT
ESTATE OF HOMER W. SPEER

Asset	Sold to	Date of Order Authorizing Sale	Synoptic Folio	Appraised Value	Amount Realized	Loss on Realization	Gain on Realization	Distributed or Charged to Expense	Assets not Disposed of
Checking account in Montrose State Bank			1	$ 9,136.28	$ 9,136.28				
Savings account in Montrose Trust Co.			1	3,000.00	2,400.00	$600.00			
Accrued interest thereon			1	35.00	35.00				
Account due from Denver Reservoir Co., $367.57				no value					no value
Account due from Charles C. Labanon				762.20					$ 762.20
Policy No. 11736, Fellowship Life Insurance Co.			1	5,117.69	5,117.69				
Mortgage note of Amos Breslau				5,000.00					5,000.00
Accrued interest thereon			1	145.83	145.83				
300 shares stock of American Carso Co., par $30,000				30,900.00					30,900.00
Dividend declared Sept. 30, 1919			1	2,100.00	2,100.00				
Bonds of Gypsum Valley Co., par $10,000	Second National Bank	12/18/19	1	9,000.00	9,500.00		$500.00		
Accrued interest thereon			1	291.67	291.67				
Five-passenger Washington touring car	Luella M. Fry	12/18/19	1	1,000.00	1,200.00		200.00		
Hendricks coupe	John Speer	12/18/19	1	700.00	700.00				
Deferred interest on note to Second National Bank			1	349.68				$349.68	
National Fire Insurance Co., settlement policy No. 19685	National Fire Insur'ce Co.	11/30/20	1	5,650.00	3,000.00	2,650.00			
Deferred insurance on National Fire Insurance Co., policy No. 19,685			1	42.22				42.22	
				$73,230.57	$33,626.47	$3,250.00	$700.00	$391.90	$36,662.20
Assets not in Inventory:									
Two shares common stock of the Hodges Co.	J. H. Hodges	3/1/20	1	142.00	142.00				
Montrose State Bank, savings account			1	1,000.00	1,000.00				
Accrued interest thereon			1	11.67	11.67				
Note of Robert M. Olmstead, due Feb. 1, 1921, no interest				200.00					200.00
				$74,584.24	$34,780.14	$3,250.00	$700.00	$391.90	$36,862.20

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Form 28. Account of Proceedings

.....COUNTY SURROGATE'S COURT
In the matter of the petition of.....
.....
to render and settle.....
account as.....of
..... Deceased.

ACCOUNT OF PROCEEDINGS

To the Surrogate's Court of the County of.....
.....
do render the following account of.....proceedings as .....of....., deceased:
On the.....day of.....A. D. 192.. Letters..... were duly issued to..... On the.....day of..... A. D. 192.., ...caused an inventory of the personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts, by appraisements by the appraisers duly appointed, to $.....

Schedule A, hereunto annexed, contains an itemized statement of all the property contained in said inventory, or which has come into..... possession since the making of such inventory, also a statement of the property sold by.....at public or private sale, with the prices and manner of sale, which sales were fairly made by.....at the best prices that could then be had, with due diligence, as.....then believed. It also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest or moneys received by.....for which.....legally accountable on account of principal, and also a statement of all debts in said inventory mentioned, not collected or collectible by....., together with the reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property mentioned in said inventory distributed or remaining unsold, and the reason of the latter's being unsold, and their appraised value, also a statement of all property mentioned therein which has been lost by accident, without any willful default or negligence, the cause of its loss and its appraised value. No other assets than those in said inventory except as herein set forth have come to.....possession or knowledge, and all the increase and decrease in the value of any assets of said deceased is allowed or charged in said Schedule.

Schedule B, hereunto annexed, contains a statement of all moneys paid by.....for funeral and other necessary expenses for said estate, together with the reasons for and object of such expenditures.

On or about the.....day of.....A. D. 192.., ... caused a notice for claimants to present their claims against the said estate to.....within the period fixed by law, and at a certain place therein specified, to be published according to law, for six months pursuant to an order of the Surrogate of the County of..... Due proof of publication herein filed,.....refer to as part of this account.

Schedule C, hereunto annexed, contains a statement of all the claims of creditors presented to and allowed by.....or disputed by..... and for which judgment or decree has been rendered against..... together with the names of the claimants, and general nature of each claim, its amount, and the time of the rendition of the judgment; it also

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contains a statement of all moneys paid by.....to the creditors of the deceased, and their names, and the times of such payments.

Schedule D, hereunto annexed, contains a statement of all moneys paid on general and demonstrative legacies to the legatees, widow or next of kin of the deceased.

Schedule E, hereunto annexed, contains a statement of all moneys paid to the trustee....on account of principal.

Schedule F, hereunto annexed, contains, so far as they can be ascertained with due diligence, the names and post-office addresses of all persons interested in this proceeding who are required to be cited, or concerning whom the Court is required to have information, to the best of.....knowledge, information, and belief.

Schedule G, hereunto annexed, contains a statement of all income received from said estate.

Schedule H, hereunto annexed, contains a statement of all loss of income without any willful default or negligence and the cause of its loss.

Schedule I, hereunto annexed, contains a statement of all moneys paid by.....for necessary expenses against the income of said estate, together with the reasons for and object of such expenditures.

Schedule J, hereunto annexed, contains a statement of all moneys paid to the trustee....on account of income.

Schedule K, hereunto annexed, contains a statement of all other facts affecting administration of said estate, right, and those of others interested therein.

SUMMARY OF ACCOUNT

First, as to corpus:		
I charge myself with:		
Inventory, per Schedule A.....	$152,364.85	
Assets Not in Inventory, per Schedule A....	1,475.23	
Gain on Realization, per Schedule A.....	952.28	
Total Charges		$154,792.36
I credit myself with:		
Loss on Realization, per Schedule A.....	$ 4,250.63	
Specific Legacies Distributed, per Schedule A	16,023.28	
Inventory Not Realized Upon, per Schedule A	81,841.49	
Funeral and Administration Expenses, per Schedule B	5,090.52	
Debts of Decedent, per Schedule C.....	15,758.04	
Payments of General and Demonstrative Legacies, per Schedule D.....	6,000.00	
Payments of Principal to Trustee, per Schedule E	7,239.05	
Total Credits		136,203.01
Leaving a balance of cash of.....		$ 18,589.35
Inventory Not Realized Upon, per Schedule A.....		81,841.49
Total Balance of Corpus.....		$100,430.84

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Second, as to income:		
I charge myself with:		
Income Realized, per Schedule G.....		$ 10,132.69
I credit myself with:		
Expense Against Income, per Schedule H..	$ 2,332.28	
Loss on Income, per Schedule I.....	750.00	
Payments of Income to Trustee, per Schedule J	4,000.00	
Total Credits		7,082.28
Balance of Income Cash.....		$ 3,050.41

Leaving a balance of..... $.....
to be distributed to those entitled thereto, subject to the deductions of the amount of.....commissions and the expenses of this accounting. The said schedules, which are severally signed by.....are part of this account.

The schedules, which are merely a matter of accounting detail not presenting any problems, are not given here.

It must be remembered that most states provide by law for the form and phraseology of the final accounting. Although the above is generally representative of all, yet the law of the state in which the estate is being administered must be consulted.

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Form 29. (a) Synoptic for Accounts of an Individual Trustee (folio 1)

ESTATE OF JAMES C. DAWSON

1. CHARLES FRAZIER, TRUSTEE

Entry No.	Date	Item	Folio	Cash			Investments			Principal			Income		
				Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Cr. Bal.	Dr.	Cr.	Cr. Bal.
	1921														
1	Feb. 12	Butler University Trust—Securities set aside and now received from executor, as follows: 100 shares Appleton Mining Co., 7% preferred stock, par value $10,000, present market, $10,375, inventory value, $10,300. Bond of, *etc.*	1				$40,000.00		$40,000.00		$40,000.00	$40,000.00			
2	Feb. 12	Janet Dawson Reeves Trust—Cash, securities, and real estate set aside and now received from executor, as follows: Cash, $10,370, apartment house located on lots 7–12, *etc.*	2	$10,370.00		$10,370.00	89,630.00		129,630.00		100,000.00	140,000.00			
3	Feb. 12	Mary Dawson Allen Trust—Cash and securities set aside, *etc.*	3	1,282.00		11,652.00	98,718.00		228,348.00		100,000.00	240,000.00			
4	Feb. 12	Undivided Estate—Cash, securities, real estate, and other assets received from executor, not specifically set aside for any trust, but held in trust to furnish an annuity of $2,400 to Henry G. Dawson and to maintain and educate the children of James C. Dawson, as follows, *etc.*	4	5,348.00		17,000.00	334,652.00		563,000.00		339,800.00	579,800.00		$200.00	$200.00
5	Feb. 13	Janet Dawson Reeves Trust—Purchased for this trust $10,000 par value of 5½% bonds of City of Montrose, Colo., at 102 and commission	2		$10,210.00	6,790.00	10,210.00		573,210.00						
6	Feb. 20	Mary Allen Dawson Trust—Sale of 40 shares of Stevenson Manufacturing Co. stock, inventory value $3,400, for $4,600, less commission	3	4,595.00		11,385.00		$3,400.00	569,810.00		1,195.00	580,995.00			
7	Feb. 20	Mary Allen Dawson Trust—Sale of $1,000 bond of Tinplate Can Co., inventory value $950, for $920, less commission	3	919.00		12,304.00		950.00	568,860.00	$31.00		580,964.00			
8	Mar. 1	Janet Dawson Reeves Trust — Rent for March from, *etc.*	2	350.00		12,654.00								350.0	550.00

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Form 29. (b) Synoptic for Accounts of an Individual Trustee (folio 2)

Entry No.	Date	Item	Folio	Cash			Investments			Principal			Income		
				Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Cr. Bal.	Dr.	Cr.	Cr. Bal.
		Brought Forward				$12,654.00			$568,860.00			$580,964.00			$ 550.00
9	1921 Mar. 1	Janet Dawson Reeves Trust—Payment on income	2		$ 350.00	12,304.00							$ 350.00		200.00
		Miscellaneous transactions omitted in order not to complicate the text unnecessarily are summarized as follows:													
		Butler University Trust	1	$2,424.00	2,424.00	12,304.00							2,424.00	$2,424.00	200.00
		Janet Dawson Reeves Trust	2	68,716.00	68,643.00	12,377.00	$60,390.00	$50,000.00	579,250.00		$10,416.00	591,380.00	8,253.00	8,300.00	247.00
		Mary Allen Dawson Trust	3	23,389.00	23,388.00	12,378.00	17,388.00	17,390.00	579,248.00	$1,243.00	1,012.00	591,149.00	6,000.00	6,230.00	477.00
		Undivided Estate	4	101,260.00	90,054.00	23,524.00	34,654.00	33,460.00	580,442.00	2,260.00		588,889.00	55,400.00	70,000.00	15,077.00
10	1922 Jan. 22	Janet Dawson Reeves Trust—Bill of A. C. Hartman for repairs to, *etc*	2		47.00	23,477.00							47.00		15,030.00
11	Jan. 24	Undivided Estate—Investment of excess income, cash as follows, *etc*	4		5,346.00	18,131.00	5,346.00		585,788.00						
12	Jan. 31	Mary Allen Dawson Trust—Transferring excess income to Undivided Estate of James C. Dawson	3		230.00	17,901.00							230.00		14,800.00
13	Jan. 31	Undivided Estate—Excess income from Mary Allen Dawson Trust	4	230.00		18,131.00					230.00	589,119.00			
		Entries Made as of Later Dates													
14	1932 May 6	Janet Dawson Reeves Trust—Delivery of assets to executor of estate of Janet Dawson Reeves	2		186.00	17,945.00		110,230.00	475,558.00	110,416.00		478,703.00			
15	1941 Jan. 31	Butler University Trust—Reversion of trust fund	1					40,000.00	435,558.00	40,000.00		438,703.00			
16	Jan. 31	Undivided Estate—Reversion of Butler University Trust Fund	4				40,000.00		475,558.00		40,000.00	478,703.00			

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Form 30. Trust Ledger

1. BUTLER UNIVERSITY TRUST

Entry No.	Date	Item	Folio	Cash			Investments			Principal			Income		
				Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Cr. Bal.	Dr.	Cr.	Cr. Bal.
	1921														
1	Feb. 12	Securities set aside and now received from executor, as follows: 100 shares Appleton Mining Co., 7% preferred stock, par value $10,000, present market value, $10,375, inventory value, $10,300. Bond of, *etc.*	1				$40,000.00		$40,000.00		$40,000.00	$40,000.00			
		Miscellaneous transactions omitted in order not to complicate the text unnecessarily are summarized as follows	2	$2,424.00	$2,424.00								$2,424.00	$2,424.00	
	1941														
15	Jan. 31	Reversion of trust fund	2					$40,000.00		$40,000.00					

2. JANET DAWSON REEVES TRUST

Entry No.	Date	Item	Folio	Cash			Investments			Principal			Income		
				Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Cr. Bal.	Dr.	Cr.	Cr. Bal.
	1921														
4	Feb. 12	Cash, securities, and real estate set aside and now received from executor, as follows: Cash, $10,370; apartment house located on lots 7–12, *etc.*	1	$10,370.00		$10,370.00	$89,630.00		$89,630.00		$100,000.00	$100,000.00			
5	Feb. 13	Purchased for this trust $10,000 par value of 5½% bonds of City of Montrose, Colo., at 102 and commission	1		$10,210.00	160.00	10,210.00		99,840.00						
6	Mar. 1	Rent for March from, *etc.*	1	350.00		510.00								$ 350.00	$350.00
9	Mar. 1	Payment on income	2		350.00	160.00							$ 350.00		
		Miscellaneous transactions omitted in order not to complicate the text unnecessarily are summarized as follows:	2	68,716.00	68,643.00	233.00	60,390.00	$50,000.00	110,230.00		10,416.00	110,416.00	8,253.00	8,300.00	47.00
	1922														
10	Jan. 22	Bill of A. C. Hartman for repairs to, *etc.*	2		47.00	186.00							47.00		
	1932														
14	May 6	Delivery of assets to executor of estate of Janet Dawson Reeves	2		186.00			110,230.00		$110,416.00					

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3. MARY ALLEN DAWSON TRUST

Entry No.	Date	Item	Folio	Cash			Investments			Principal			Income		
				Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Cr. Bal.	Dr.	Cr.	Cr. Bal.
	1921														
5	Feb. 12	Cash and securities set aside, *etc.*	1	$1,282.00		$1,282.00	$98,718.00		$98,718.00		$100,000.00	$100,000.00			
6	Feb. 20	Sale of 40 shares of Stevenson Manufacturing Co. stock, inventory value, $3,400, for $4,600, less commission	1	4,595.00		5,877.00		$3,400.00	95,318.00		1,195.00	101,195.00			
7	Feb. 20	Sale of $1,000 bond of Tinplate Can Co., inventory value, $950, for $920, less commission	1	919.00		6,796.00		950.00	94,368.00	$ 31.00		101,164.00			
		Miscellaneous transactions omitted in order not to complicate the text unnecessarily are summarized as follows:	2	23,389.00	$23,388.00	6,797.00	17,388.00	17,390.00	94,366.00	1,243.00	1,012.00	100,933.00	$6,000.00	$6,230.00	$230.00
	1922														
17	Jan. 31	Transferring excess income to Undivided Estate of Jane C. Dawson	2		230.00	6,567.00							230.00		

4. UNDIVIDED ESTATE OF JAMES C. DAWSON

Entry No.	Date	Item	Folio	Cash			Investments			Principal			Income		
				Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Dr. Bal.	Dr.	Cr.	Cr. Bal.	Dr.	Cr.	Cr. Bal.
	1921														
4	Feb. 12	Cash, securities, real estate, and other assets received from executor, not specifically set aside for any trust, but held in trust to furnish an annuity of $2,400 to Henry G. Dawson, and to maintain and educate the children of James C. Dawson, as follows, *etc.*	1	$5,348.00		$5,348.00	$334,652.00		$334,652.00		$339,800.00	$339,800.00		$ 200.00	$ 200.00
		Miscellaneous transactions omitted in order not to complicate the text unnecessarily are summarized as follows:	2	101,200.00	$90,054.00	16,494.00	34,654.00	$33,460.00	335,846.00	$2,260.00		337,540.00	$55,400.00	70,000.00	14,800.00
	1922														
11	Jan. 24	Investment of excess income cash as follows, *etc.*	2		5,346.00	11,148.00	5,346.00		341,192.00						
15	Jan. 31	Excess income from Mary Allen Dawson Trust	2	230.00		11,378.00					230.00	337,770.00			
	1941														
16	Jan. 31	Reversion of Butler University Trust Fund	2				40,000.00		381,192.00		40,000.00	377,770.00			

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Form 31. Typical Synoptics Used by Trust Companies

Fort Dearborn Trust and Savings Bank — TRUST ACCOUNT NO.

		DESCRIPTION	CASH			SECURITIES			INCOME			PRINCIPAL		
			Received	Disburse	Balance	In	Out	Balance	Decreased	Increased	Balance	Decreased	Increased	Balance

FIRST WISCONSIN TRUST COMPANY, MILWAUKEE

REMARKS — TRUST NO.

	STOCKS & BONDS			REAL ESTATE			ACCOUNTS RECEIVABLE			ACCOUNTS PAYABLE			SUNDRY			PRINCIPAL		
	IN	OUT	BALANCE	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	WITHDRAWAL	DEPOSIT	BALANCE

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FIRST WISCONSIN TRUST COMPANY, MILWAUKEE

TRUST NO. NAME

DATE	EXPLANATION	VOUCHER	FOLIO	CASH			INCOME & EXPENSE			NOTES & MORTGAGES			
				DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	IN	OUT	BALANCE	

Form 32. (a) Detailed Accounting Forms of a Trust Department

—— NATIONAL BANK, AS _____ ESTATE OF _____

WITH _____, AS _____ CORPUS _____ DIED RESIDENT OF _____

DATE OF LETTERS _____ SURROGATE COURT, COUNTY OF, ___ STATE

DATE OF DEATH _____ DATE OF PROBATE _____

	Date	INFORMATION	Distributions Expenses and Debts	Decrease	Inventory	Increase	Corpus	
			Debit	Debit	Credit	Credit	Cr. Balance	

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Form 32. (b) Detailed Accounting Forms of a Trust Department

Estate of _____ Asset—Bank Balances —— National Bank, as _____

	Date	INFORMATION	Name of Bank, Trust Co. Etc.	Bank Book No.	State Located in	Interest Rate	Debit	Credit	Debit Balance

Form 32. (c) Detailed Accounting Forms of a Trust Department

Estate of _____ Asset —Stocks —— National Bank, as _____

NAME OF COMPANY _____ Incorporated in _____

Kind _____ Provisions _____ Dividend Payable _____ Rate _____ Par Value _____

	DATE	NO. OF SHARES	INFORMATION	CERTIFICATE NUMBERS	RECEIVED DR.	DELIVERED CR.	DR. BALANCE

NAME OF COMPANY _____ Incorporated in _____

Kind _____ Provisions _____ Dividend Payable _____ Rate _____ Par Value _____

	DATE	NO. OF SHARES	INFORMATION	CERTIFICATE NUMBERS	RECEIVED DR.	DELIVERED CR.	DR. BALANCE

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Form 32. (d) Detailed Accounting Forms of a Trust Department

Estate of _____ Asset—Investments (Bonds, Notes, etc.) C/D

—— National Bank, as _____

NAME OF SECURITY _____

Rate _____ % Interest Payable _____ Tax Status _____ Maturity _____ Special (_____)

	DATE	DENOMINATIONS (Par Value)	INFORMATION	NUMBERS	RECEIVED DR.	DELIVERED CR.	DR. BALANCE

NAME OF SECURITY _____

Rate _____ % Interest Payable _____ Tax Status _____ Maturity _____ Special (_____)

	DATE	DENOMINATIONS (Par Value)	INFORMATION	NUMBERS	RECEIVED DR.	DELIVERED CR.	DR. BALANCE

Form 32. (e) Detailed Accounting Forms of a Trust Department

Estate of _____ Asset—Accrued Receivables —— National Bank, as _____

To Date of Death _____

	Date	INFORMATION	ASSET ACCRUED ON	INTEREST Dr.	INTEREST Cr.	Dividends, Rents Miscellaneous Dr.	Dividends, Rents Miscellaneous Cr	BALANCE Dr.

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Form 32. (f) Detailed Accounting Forms of a Trust Department

Asset—Real Estate & Mortgages

Estate of_____ ——National Bank, as_____

	Amount, $	TAX BILLS EXAMINED Year Assessed Value / Year Assessed Value	INTEREST PAYMENTS When Due / Amount / Day of Pay't	INSURANCE No. of Policy / Company / Date of Expiration / Amount
	Interest rate %; Accrues from			
	Interest Payable			
	Mortgage date , Prin due			
	Extended to			
	Premises			
	Description			
	Location; Sec. Block Lot			
	Dimensions; Land Building			
	Date of Appraisal			
	Appraiser Land Building Total			
	$ $ $			
		MORTGAGE RECORDED / ASSIGNMENT RECORDED		
		State / State		
		County Date / County Date		
	Mortgagor	Sec. Liber Page / Sec. Liber Page		
	Address	Block No. / Block No.		
		ASSIGNMENT RECORDED		
		State / State		
	Present Owner	County Date / County Date		
	Address	Sec. Liber Page / Sec. Liber Page		
		Block No. / Block No.		

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Form 32. (g) Detailed Accounting Forms of a Trust Department

Estate of _____ Asset—Miscellaneous —— National Bank, as _____

Date	INFORMATION	Debit	Credit	Debit	Credit	Debit	Credit	DEBIT BALANCE

Form 32. (h) Detailed Accounting Forms of a Trust Department

Estate of _____ Asset—Cash —— National Bank, as _____

Date	INFORMATION	DEBIT		DEBIT	Vouch. Register		CREDIT			Debit Balance
		Realization of Assets		Acquired in Other Ways	Date Received	No.	Administration Expense	Debts	Legacies	
		Realty	Personalty							

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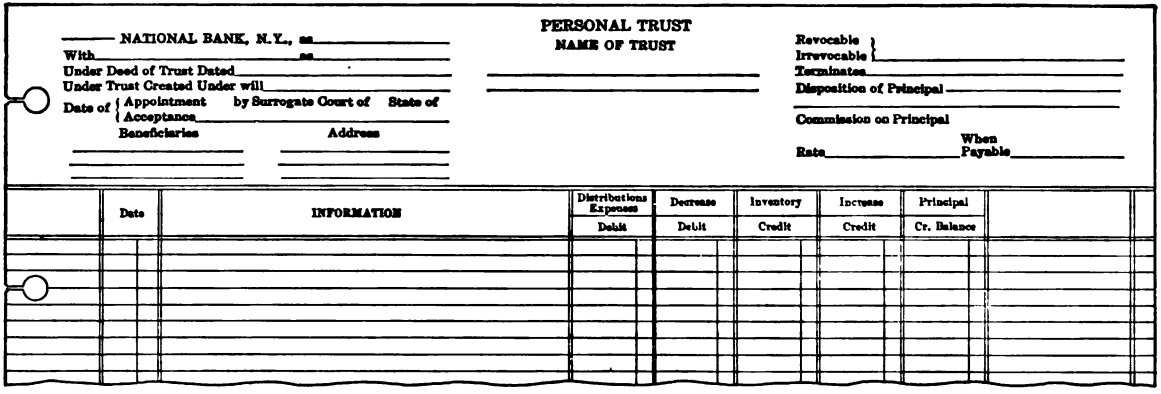
Form 32. (i) Detailed Accounting Forms of a Trust Department



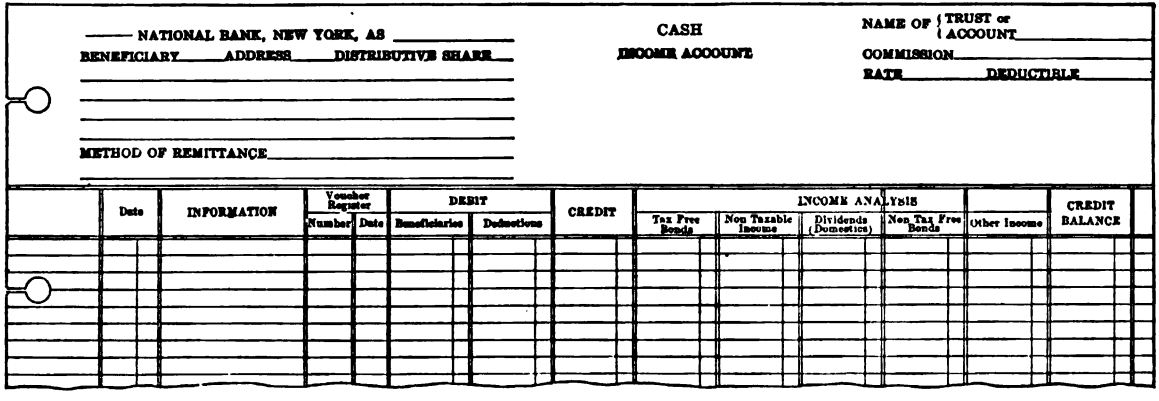
_____ NATIONAL BANK, N.Y., as _____
With _____ as _____
Under Deed of Trust Dated _____
Under Trust Created Under will _____
Date of { Appointment / Acceptance _____ by Surrogate Court of _____ State of _____
Beneficiaries _____ Address _____

PERSONAL TRUST
NAME OF TRUST

Revocable / Irrevocable
Terminates
Disposition of Principal
Commission on Principal
Rate _____ When Payable _____

	Date	INFORMATION	Distributions Expenses Debit	Decrease Debit	Inventory Credit	Increase Credit	Principal Cr. Balance	

Form 32. (j) Detailed Accounting Forms of a Trust Department



_____ NATIONAL BANK, NEW YORK, AS _____
BENEFICIARY ADDRESS DISTRIBUTIVE SHARE
METHOD OF REMITTANCE _____

CASH
INCOME ACCOUNT

NAME OF { TRUST or / ACCOUNT _____
COMMISSION _____
RATE DEDUCTIBLE

	Date	INFORMATION	Voucher Register Number	Voucher Register Date	DEBIT Beneficiaries	DEBIT Deductions	CREDIT	INCOME ANALYSIS Tax Free Bonds	INCOME ANALYSIS Non Taxable Income	INCOME ANALYSIS Dividends (Domestics)	INCOME ANALYSIS Non Tax Free Bonds	Other Income	CREDIT BALANCE

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Form 32. (k) Detailed Accounting Forms of a Trust Department

PERSONAL TRUST DEPARTMENT RECORD

——— NATIONAL BANK

Reported to Executive Committee			From whom received		
Date of death	Place of death		Will dated	Letters granted	
Legal Residence of Deceased			Will probated in	County;	State; Date
Ancillary Administration Necessary in					
Inheritance, Estate and Transfer Taxes					
Federal 60 days notice due	Filed		Tax and report due	Report filed	Tax paid
New York: Deposit for discount due			Deposit paid	Refund received	
Other States					
Paid					
Advertising for Claims commenced	in		and	Time for filing claims expires	
Income Tax					
Personal return filed for previous year?			Tax paid?		
Personal return prepared for current year to date of death			Date filed	Amount of tax	Date paid
Fiduciary return for current year filed					
Fiduciary return for year of distribution of estate filed					
		ANALYSIS OF WILL			
Article of Will	Legatee	Relation	Legacy		Paid

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APPENDIX

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APPENDIX A

CASES

§ 1

Rigney v. Chicago, 102 Ill. 77
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§ 2

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§ 3

Clarke v. Clarke, 178 U. S. 186
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§ 4

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§ 5

People v. Williams, 24 Mich. 156
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§ 6

Winfree v. Bagley, 102 N. C. 515

§ 7

Johns v. Johns, 1 Ohio St. 350
In re Jones, 172 N. Y. 575

§ 8

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Atlantic S. D. Co. v. Laundry Co., 64 N. J. Eq. 140

§ 9

Carlton v. Carlton, 72 Me. 116
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§ 10

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U. S. v. Perkins, 163 U. S. 625
Minst v. Winthrop, 162 Mass. 119

§ 11

Den v. Mugway, 15 N. J. L. 331

§ 12

Clayton v. Drake, 17 Ohio St. 367

§ 13

Thorman v. Frame, 176 U. S. 350

§ 14

In re McLaughlin, 103 Cal. 429
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§ 15

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§ 16

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§ 20

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§ 23

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§ 24

Rich v. Gilkey, 73 Me. 595
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§ 26

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§ 28

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§ 30

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§ 34

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§ 36

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§ 37

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§ 38

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§ 41

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§ 45

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§ 46

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§ 47

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§ 47 (*Continued*)
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§ 48
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§ 49
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§ 50
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§ 51
Chauvet v. Ives, 173 N. Y. 192

§ 52
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§ 53
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§ 54
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§ 55
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§ 56
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§ 57
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§ 58
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§ 59
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§ 60
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§ 61
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§ 62
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§ 63
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§ 64
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§ 65
Matter of Baldwin, 27 App. Div. (N. Y.) 506

§ 66
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APPENDIX B

GLOSSARY

ABATE(MENT). To make less, destroy; a reduction of rent, interest, or an amount due; the reduction of a legacy when an estate is insufficient to pay all debts and legacies.

ABEYANCE. The condition of an estate when there is no one entitled to it at the present time.

ACCRUE. To grow to; to be added to, as the interest accrues on the principal.

ADJUDICATION. A decision or judgment.

AD LITEM. For the suit.

AFFINITY. Relationship acquired by marriage as distinguished from consanguinity. See Consanguinity.

ALIENATION. A transfer of the title to property by one person to another, by conveyance, as distinguished from inheritance; a devise of real property is regarded as alienation.

ANCILLARY. Letters testamentary or of administration for the purposes of additional administration, where there are assets or property in some other county, state, or country, granted usually to the executor or administrator who has been appointed in the place of the principal administrator.

ANIMO REVOCANDI. With intent to revoke.

ANNUITY. A periodical payment of money, amounting to a fixed sum in each year, the moneys paid being either a gift or in consideration of a gross sum received.

ANNUL. To do away with; to make null or void.

ANTICIPATION. Doing a thing before its proper time, e.g., dealing with or distributing property, income, etc., before the time fixed by deed or will conveying the same.

APPRAISEMENT. A valuation of property.

APPRAISER. One who makes a valuation on property.

ASSESS. To ascertain the value of a man's property for taxation.

ATTESTATION. The evidencing of any formal instrument by witnesses.

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BENEFICIARY. A *cestui que trust*, one who has the profit, benefit, or advantage arising from a contract or a trust.

BEQUEATH. To give personal property by will, as distinguished from devise, which is to give real property by will.

BONA FIDE. In good faith; honestly.

CAPACITY. Legal ability to contract, to convey property, to sue and be sued, etc.

CAPITATION TAX. A tax paid by everyone in a community; a poll tax.

CAUSA MORTIS. In view of death; a gift made by one in view of death, and revocable before death any time.

CESTUI QUE TRUST. See Beneficiary.

CHATTELS. Articles of personal property; movable goods; movable assets; also (for most purposes) any interest in land other than an estate for life or of inheritance.

CHOSES IN ACTION. An intangible right enforceable by action; a right to recover a sum of money or a thing from another person in a court of justice.

CITATIONS. A summons to appear before the court issuing the citation in order to testify or give evidence in some particular case.

CLOSE CORPORATION. One whose entire stock is held by those active in its management or by members of one family; one whose stock is not on the market.

CODE. A collection or making uniform of a number of laws.

CODICIL. An addition or supplement to a will, executed with as great formality as the will itself.

COLLATERAL. Relationship by blood, not lineal.

COMMON LAW. English law as distinguished from foreign, civil, or canon law; that part of English law which does not depend on statutes.

COMPOS MENTIS. Sound of mind or capable of doing acts.

CONSANGUINITY. Relationship by blood; the relationship or connection of persons descended from the same stock or common ancestor as distinguished from affinity. See Affinity.

CONTEMPT OF COURT. A disregard or wilful neglect of the order or authority of a court, such as refusing to appear when summoned by the court.

CONTINGENT. That which depends upon some happening or occurrence; doubtful, conditional.

CORPOREAL. A material thing.

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CORPUS. The substance; the capital of a fund or estate as distinguished from the income.

COVERTURE. The condition of a married woman.

CUM TESTAMENTO ANNEXO. With the will annexed.

CURTESY. The husband's estate in the wife's property after her death.

DE BONIS NON. An administrator *de bonis non* is one who takes charge of any property not executed or settled by a previous administrator whose place he is taking.

DECREE. The order made by a court of equity.

DEMISE. A conveyance, either in fee or for life, or for years.

DEPRECIATION. The reducing of the value of an article or thing.

DESCENT. The hereditary devolution of real property either to a single heir at law or to the nearest relatives in the same degree, whether in a descending, ascending, or collateral line.

DEVISE. To give real property by will.

DISTRIBUTION. The proportionment of disposition of the personal estate of an intestate.

DONEE. One who receives a gift.

DONOR. One who gives a gift.

DOWER. The right of a wife after her husband's death in one-third of all the lands owned by her husband during the married state.

EAR WITNESS. One who testifies as to what he himself heard.

ENTAIL. A fee limited to the issue, or certain classes of issue, instead of descending to all the heirs.

EQUITABLE CONVERSION. A change in the nature of property, by which, for certain purposes, real estate is considered as personal property and vice versa, and transmissible and descendible as such.

EQUITABLE ESTATE. A right or beneficial interest in land, the legal title to which is in another, and which can be enforced only in a court of equity.

EXECUTOR. One appointed by a testator in his will, to take charge of the settlement of his estate at the testator's death.

EXECUTION. The signing, sealing, acknowledging, and delivering with proper formalities, and in the presence of a proper number of witnesses, or officer, of a deed, will, or other instrument.

EYE WITNESS One giving evidence as to something which he himself has seen.

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FEE. An estate of inheritance divided into three kinds: (1) fee simple, an absolute estate of inheritance; (2) qualified or limited estates; and (3) fee tail, an inherited estate limited to one person and the heirs of his body.

FIDUCIARY. One who holds property in trust for another.

GOOD-WILL. The benefit acquired by a business beyond the value of its net tangible assets, in consequence of its having a body of regular customers and a general reputation.

GUARDIAN. One chosen or appointed to take charge of the estate and education of an orphan, ward, or minor.

HEARSAY EVIDENCE. The evidence of a witness which he obtained from another, in contradistinction to ear and eye witnesses.

HEIR. One who succeeds by descent to an estate in land or would have succeeded had his ancestor died intestate.

HEREDITAMENTS. Every sort of inheritable property, such as corporeal, incorporeal, personal, and mixed.

HOLOGRAPHIC. A deed or will written entirely in the handwriting of the person making the deed or will.

IMMATERIAL EVIDENCE. Evidence which does not apply to the point at issue.

INALIENABLE. That which cannot be transferred.

INCOME. The gain which proceeds from property, labor, or business; it is applied particularly to individuals.

INCORPOREAL. That which is not material; intangible; unable to be handled, seen, or heard; invisible.

INQUEST. An investigation by the coroner as to the cause of the death of a person.

INTERPOLATE. To put in words in a completed or executed document.

JOINT TENANCY. The owning by two or more persons of a piece of property; upon the death of one the share owned by him passes to the survivor.

JOINT WILL. One will executed by two persons, which is probated twice.

JURISDICTION. The power of a court to decide any action or matter; the district over which the power of a court extends.

KIN OR KINDRED. Persons who are related by blood.

LEGACY. A gift of personal property made by will.

LEGATEE. One who has a legacy left to him; the beneficiary of a gift.

LIFE TENANT. One who has the right to certain property during his lifetime, or during the lifetime of another.

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LINEAL DESCENDANTS. In a direct line from a common ancestor.

LIS PENDENS. A suit or action that is pending.

LITIGANT. A person engaged in a lawsuit.

MANDATE. A judicial command; a charge or commission; a bailment of goods without reward (mandatum).

MANDATORY. Directory.

MUTUAL TESTAMENT. Wills made by two persons, each leaving his property to the other if that other survives.

NEXT OF KIN. Those related by blood who would take personal estate of one who dies intestate.

NON COMPOS MENTIS. Not of sound mind.

NUGATORY. That which has no force or authority.

NUNCUPATIVE. Made by word of mouth to someone else and afterwards written out.

OLEOGRAPHIC. See Holographic.

PENDENTE LITE. While the suit is pending.

PERPETUITY. The tying up or disposing of an estate so that it never becomes at the absolute disposal of any person or number of persons. This is against public policy and so the "rule against perpetuities" was generally adopted.

PER STIRPES. By families, thus: In a gift to A and the children of B, if they are to take *per capita*, each child will have a share equal to that of A, but if they are to take *per stirpes* A will take one-half and the other one-half will be divided among the children of B.

POLL TAX. See Capitation Tax.

POSTHUMOUS CHILD. One born after the death of the father.

PROBATE. The proceeding by which a person's will or testament is established as such.

RENUNCIATION. A giving up, or declining; applying more particularly to an executor or administrator who declines or refuses to take such office.

RESIDUARY. Pertaining to the residue of an estate after settlement.

REVERSIONARY INTEREST. That which is to be enjoyed at a future time, after the determination of an intermediate estate.

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